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Ontario Advisory Committee on Confederation

**BACKGROUND PAPERS AND REPORTS
VOLUME 2**

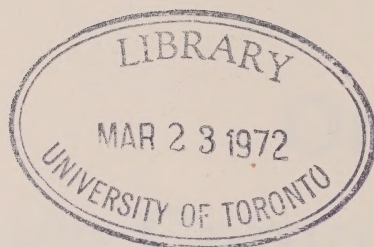


ONTARIO

Ontario Advisory Committee on Confederation

BACKGROUND PAPERS AND REPORTS

VOLUME 2



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Contents

Preface	ix
Terms of Reference	xi
Members of the Ontario Advisory Committee on Confederation	xiii
Introduction: A View from the Chair	xv
1 REGIONALISM AND CONFEDERATION	
Paul W. Fox	1
<i>The Argument · Alternations in Federal-Provincial Power · Reasons for the Contemporary Change in Balance of Power · Conclusions</i>	
2 GEO-POLITICS AND THE CANADIAN UNION	
John Conway	28
3 THE NATURE OF A BICULTURAL CONSTITUTIONALISM	
Edward McWhinney	50
4 OUR PRESENT DISCONTENTS	
Eugene Forsey	60
5 WHAT IS WRONG WITH THE BRITISH NORTH AMERICA ACT?	
C. R. Magone	85
<i>What the B.N.A. Act Did · Constitutional Amendment</i>	
	v

- 6 THE DISTRIBUTION OF LEGISLATIVE POWER
SOME FACTS AND ISSUES**
- Alexander Brady** 92
- The British North America Act and Amendments .
Changes Through Other Imperial Statutes . The
Expanding Activity of Governments . The Constitution
under Review*
- 7 CANADIAN FEDERALISM: FOREIGN AFFAIRS
AND TREATY POWER**
- THE IMPACT OF QUEBEC'S "QUIET REVOLUTION"**
- Edward McWhinney** 115
- Foreword . Labour Conventions 1937, Revisited . The
Confusion Between Treaty-making and Treaty-
implementation . Fact and Fancy in Transnational
Provincial Activities: Quebec's Cultural Accords with la
Francophonie . The Off-Shore Mineral Rights Issue . The
Montreal International Airport Quarrel . The St. Jean-
Baptiste Day Incident, 1969 . Federal Comity and the
Pragmatic, Empirical, Problem-Oriented, Step-by-Step
Approach to Federal-Provincial Relations . Epilogue:
Ottawa, Paris, and Quebec: la Guerre des Boutons*
- 8 PROVINCIAL TRANSNATIONAL ACTIVITY:
AN APPROACH TO A CURRENT ISSUE IN
CANADIAN FEDERALISM**
- Ronald G. Atkey** 153
- Introduction . The Rationale of Provincial Claims to
International Competence: Aspects of Canadian
Federalism . The Legal Arguments . Recommendations:
Provincial Activity and a Presumption of Validity*
- 9 THE PROVINCIAL INTEREST IN BROADCASTING
UNDER THE CANADIAN CONSTITUTION**
- Ronald G. Atkey** 189
- Introduction . The Interrelationship of Federal and
Provincial Powers . The Key Issue: The Problem of*

Defining "Educational Programs" . Constitutional Recommendations in the Field of Broadcasting . Appendix I, Bill C-179, An Act to Establish the Canadian Educational Broadcasting Agency . Appendix II, Bill 43, An Act to Establish The Ontario Educational Communications Authority

10 FRENCH-LANGUAGE PUBLIC SECONDARY SCHOOLS IN ONTARIO

Cultural and Educational Subcommittee 256

Historical Background . French-Language Instruction in Primary Schools . French-Language Instruction in Secondary Schools . Policy Alternatives . Other Recommendations . Conclusion . Summary of Principal Recommendations

11 CONCERNING A BILL OF RIGHTS FOR CANADA AND ONTARIO

W. R. Lederman 273

Notes and Comments Concerning a Bill of Rights for Canada with Particular Reference to the Canadian Bill of Rights . Supplementary Memorandum Concerning a Bill of Rights for Canada . A Comment on the Canadian Bill of Rights and the Judgment of the Supreme Court of Canada in the Case of: The Queen v. Joseph Drybones . Appendix I, The 1960 Canadian Bill of Rights . Appendix II, A Bill of Rights for Ontario

12 THOUGHTS ON REFORM OF THE SUPREME COURT OF CANADA

W. R. Lederman 294

13 SECOND CHAMBERS IN FEDERAL POLITICAL SYSTEMS

R. L. Watts 315

The Issue of Senate Reform in Canada . Relevance of Experience in Other Federal Systems . Nature of Federal

Political Systems . Pluralist and Parliamentary Federal Systems . The Bicameral Compromise . Powers of Second Chambers . Composition and Membership of Second Chambers . Lessons for Canadian Senate Reform

14 THE SENATE

Eugene Forsey 356

15 THE NATIONAL CAPITAL PROBLEM

J. Harvey Perry 364

Some Basic Data . The Problem . Issues of Government . Possible Solutions . Hull

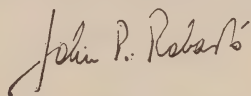
Preface

Since Volume 1 of *Background Papers and Reports* was published in 1967, the Government of Canada and the governments of the provinces have been conducting a comprehensive review of our constitution. The purpose of and need for the review is simple enough: to determine the adequacy of the constitutional provisions under which our federation is governed after more than a century of living together. However, as in so many human affairs, the accomplishment of this task is more difficult. The complex and highly subjective questions involved in the review have presented a novel challenge to all Canadians, particularly to those of us who have been seated around the conference table.

From the commencement of this endeavour, therefore, the Government of Ontario has sought to obtain informed and thoughtful counsel on the wide variety of issues posed by the review. We are fortunate to have had regular and frequent assistance from the Ontario Advisory Committee on Confederation since its establishment in 1965 and I wish to record my most sincere appreciation for their services and dedication to these endeavours.

The Committee is composed of individuals whose experiences and opinions are widely different. Thus, their discussions have substantially mirrored and articulated the diverse views which are held across Canada on the subjects raised by the review. Such diversity is plainly reflected in this second volume of papers written by members of the Committee or submitted to and considered by them.

It is still too early to forecast the final results of the constitutional review, but it is clear that it will contribute significantly to the resolution of our most pressing symbolic and functional problems. I am equally certain that we will arrive at wise conclusions in these discussions about the future direction of our country only as a result of great patience, imaginative ideas, and much lively debate from Canadians of all shades of opinion. Since the views contained between the covers of this volume are both imaginative and varied, I commend them to your attention.



John P. Robarts
Prime Minister of Ontario

September 1970

Ontario Advisory Committee on Confederation

Terms of Reference

WHEREAS the Government is concerned with the position of Ontario within the framework of Confederation;

AND WHEREAS the relationship between the Provinces and between the Provinces and the Federal Government has undergone great changes since Confederation;

AND WHEREAS the Government is desirous of seeking continuing advice in all matters which will assist it in performing its part in maintaining and strengthening the unity of Canada.

THEREFOR

- (a) A committee to be known as the Ontario Advisory Committee on Confederation will be appointed, hereinafter called the Committee,
- (b) the objects of the Committee shall be to advise the Government with respect to:
 - (i) matters in relation to and arising out of the position of Ontario in Confederation,
 - (ii) the present and future Constitutional requirements of Ontario considered both independently of and in relation to the Constitutional changes and amendments which have been established or are being studied by any Province or by the Federal Government,
 - (iii) such specific matters and questions arising from the aforesaid as the Government may from time to time refer to the Committee.

Parliament Buildings,
Toronto, Ontario
January 5, 1965

Members of the Ontario Advisory Committee on Confederation

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Department of Treasury and Economics,
Government of Ontario

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Trent University

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Edward D. Greathed, Director,
Federal-Provincial Affairs Secretariat,
Department of Treasury and Economics,
Government of Ontario

Introduction

A View from the Chair

The intriguing debate about the future of their country in which Canadians are presently engaged revolves, in large part, around issues of federalism. Indeed, our federal system of government and its institutions have been under intensive scrutiny for the past decade. As a part of this process, since 1965 the Ontario Advisory Committee on Confederation has been engaged in a continuing assessment of the issues and trends in Canadian federalism. The existence of this Committee has provided a unique opportunity to unite the views of "insiders" in government with the more detached observations of skilled outside advisers. Through it, officials in the Ontario Government have been able to expose their hypotheses to rigorous examination and to obtain the advice of the members of the Committee.

As Chairman of the Ontario Advisory Committee on Confederation, I have been privileged to stand at the fulcrum of a dynamic exchange of views and ideas. For this reason, I am taking the opportunity now to offer some introductory comments on the evolution of Canadian federalism through the day-by-day decisions of its governmental partners, and to describe the recent work of the Committee which has led to the publication of this second volume. I shall focus my remarks primarily on fiscal matters, not because they are necessarily more important than other issues, but because they serve to illustrate the inherent conflicts of a federal state.

Canada is a federal rather than a unitary state. The regional units of government have been preserved as a strong thread in the federal fabric, and governmental responsibilities have been distributed between them and the central government. As commonplace as these facts may seem, it is important to repeat them at the outset; too often, govern-

mental problems in Canada have been approached with the implicit assumption that the provinces are an unfortunate complication on the public scene. From time to time, the suggestion underlies public discussion that all would be well if only the provinces would not rock the boat, frustrate the desires of the central government, or lay roadblocks in the way of the "national interest". These rumblings reflect the belief held by many influential people that Canada would be better off as a unitary state, or a state in which governmental responsibility is highly centralized.

The fact is that we have a federal constitution. Moreover, if the Fathers of Confederation had not been obliged by history and political circumstance to create a federal state, there is surely abundant evidence to suggest that they would have been wise to do so. Regional differences, the existence of two major language groups, and the extensive responsibilities of modern governments make the federal system particularly appropriate for Canada. Although the British North America Act is a remarkable document which has served us well since 1867, it was impossible for the architects of Confederation to be clairvoyant and to foresee the great economic and social development that has produced our complex, technological, and increasingly urban society. The vast changes in economic and social realms, particularly since the end of the Second World War, have placed a great strain on the capacity of Canadian federalism. The strain has been compounded by the fact that, whereas one hundred years ago it was said that the best government was one that interfered least in the life of the citizen, today government is subjected to the paradoxical public demand for action in every imaginable field, combined with minimal interference with the rights and in the lives of individuals.

These changes have had dramatic impact on all governments in Canada. The man in the street does not carry a copy of the British North America Act around in his hip-pocket; he is not concerned with the constitutional niceties of a particular issue. When he sees a problem which needs attention, he does not attempt to determine which government is responsible for its solution. Rather, he is inclined to ask the first politician he meets: "What about it?" As a result, politicians in the federal and provincial, as well as the municipal realms, are assailed with questions such as: "What are you going to do about housing?", "What are you going to do about pollution?", and so on. In the face of these insistent demands by the electorate, it is only natural that politicians at all levels of government have become preoccupied with these problems, thereby precipitating federal-provincial disputes about the locus of responsibility for them. Thus, one level of government may conclude that the other should act, with the result that nothing is done, both

levels may provide similar services, or, even worse, both may undertake programs moving in incompatible directions.

The situation has been further aggravated by a characteristic of our particular constitutional arrangements known as "the federal spending power". The British North America Act, while unclear or incomplete in some areas, has been interpreted as providing a fairly explicit distribution of responsibilities between the federal and provincial governments. The spending power, however, has provided the central government with a residual capacity which has tended to confuse this distribution. For example, the debate over medicare became essentially a constitutional and fiscal issue, quite apart from philosophical differences about social medicine or public insurance. A matter which is technically a provincial responsibility was, *de facto*, dealt with by the central government. Interpreted rigidly, this makes just as much sense as if a provincial legislature were to pass a resolution on the question of Canada's participation in NATO or NORAD. Since health is a provincial responsibility, it is inconsistent and confusing from the provincial point of view to be confronted by federal legislation. The fact that the central government has a spending power which it can generally apply according to its interpretation of the "national interest" has resulted in uncertainty as to which level of government is actually responsible for what subject.

As a result of financial disputes, particularly those concerned with the spending power, and as a result of ferment in Quebec, disagreement between the central government and the provincial governments tended to increase throughout the 1960's. Consequently, a consensus gradually emerged that the time had come for governments to sit down together, to examine the direction in which Canada should proceed, and to attempt to devise the governmental structure which would ensure that the desired course was followed. The leaders of the provincial governments recognized this necessity at the Confederation of Tomorrow Conference in November 1967. Three months later, in February 1968, they joined with the Prime Minister of Canada in agreeing to undertake a review of Canadian federalism in general and of the constitution in particular.

In any discussion of federalism, four topics of overriding importance inevitably arise: first, constitutional questions bearing on the institutions of government and the distribution of legislative responsibilities between the different levels of government; second, fiscal or financial matters including taxation, public finance, debt management, and all other financial responsibilities which contribute to the totality of fiscal policy; third, the national economy, in the sense that our federal state has a common market just as the European Economic Community has a com-

mon market in the flow of goods and services; and fourth, and ultimately of greatest importance, the elusive human or sociological aspect which we call "national identity". I say of greatest importance, for, when we have considered the complex apparatus of the constitution, of fiscal policy, and of the economy, we are still confronted by a larger dimension of those individual aspects, a dimension that somehow explains our will to live together as a distinctive national entity, confident that our governmental system will protect and enhance both our internal cultural differences and our distinctive national characteristics.

Today each of these categories is a subject, not only of broad public discussion, but also of intensive technical and political scrutiny. The Ontario Government has been actively involved in the process, and the Ontario Advisory Committee on Confederation has sought to assist wherever possible.

It is useful to consider some of the reasons for this renewed attention. In the twenty-five years since the end of the Second World War, Canada has enjoyed the luxury of peaceful introspection, having time during this period for uninterrupted concentration on its internal affairs. In that twenty-five year period, we have had little reason to fear external stress, or, to the extent that we have, we have been forced to admit, in large part, that such matters would be looked after by the activities of other powers. In this same period, there has been a tremendous increase in the relative role of government in our society, illustrated by the fact that in the two decades 1948-1967 the total expenditure of governments in Canada, as a proportion of the Gross National Expenditure, increased from 21.8 per cent to 34.1 per cent.

As a result of these developments, and of the quiet revolution in Quebec in the 1960's, we are now at a position where history, circumstance, or external stress will not rescue Canadians from the need to decide whether this nation is going to have a more centralist form of government, or a more balanced federalism with explicit sovereignty granted in different fields to different realms, and with the financial resources distributed adequately to support the responsibilities. This is the cornerstone of the differences between the larger provinces and the federal government in the current constitutional review.

The Federal-Provincial Tax Structure Committee, established in 1964, dramatized what was already known. In the twenty-five year period since the Second World War, a remarkable shift had taken place in the role of the provinces simply in carrying out those "local" responsibilities given to them a hundred years ago. With their responsibility for education, for health, for housing, for many aspects of economic development, for transportation, and so on, the provinces suddenly gained importance

in the face of the new demographic, urban, and technological characteristics of our society.

Developments in the field of education are now a familiar story. In Ontario and several other provinces in the postwar period, there was a very rapid increase in the number of young people. At the same time, as a result of certain sociological changes, people became involved in longer programs of education, the proportion of people going to school increased, and broader courses of education were developed. Ontario rapidly moved from six to fourteen provincially supported universities and created a network of nineteen Colleges of Applied Arts and Technology. This, in turn, created new pressures and demands on the school system. The result was a tremendous acceleration of costs and expenditures. To use a simple index of the magnitude of change, we once calculated that, in the period 1967 to 1972, capital investment in Ontario university buildings would surpass the total of all such expenditure that had taken place in the previous hundred years.

Considering the rapid shift to urban centres and the number of people to be served in terms of urban renewal, rapid transit, and so on, it was not surprising that the budget of the Government of Ontario in 1970 was more than seven times the budget of the Government of Canada on the eve of the Second World War, or that the provinces and municipalities together now account for approximately three-fifths of all governmental expenditure in Canada. Similarly, in the very important sector of capital investment by governments, the provinces and the municipalities account for 80 per cent of public investment in Canada. In 1966, the Tax Structure Committee revealed that provincial expenditures were growing much more rapidly than their revenues, mainly because their revenues came from relatively inelastic fields. At the same time, it was projected that the expenditures of the federal government would grow less rapidly, while it enjoyed the more elastic revenue fields of personal income and corporation income tax. The existence of these trends was reaffirmed by the more recent work of the Tax Structure Committee.

The Committee's assessment posed a serious problem for the federal government, because it came at a time when all governments were under serious financial pressure in Canada. Certainly, it would be difficult, politically, for governments to start sharing their deficits, or to redistribute tax fields so that all governments would face deficits, with those at the provincial level not being as excessive as they might otherwise be. It is also true and should be pointed out that, as a result of the federal-provincial conferences in 1966, the federal government made major changes in the equalization payments and in post-secondary education

payments, which have resulted in substantial shifts of revenue to the provinces. However, it merely underlines the seriousness of this situation that, notwithstanding these considerable fiscal transfers, the provincial predicament remains largely unchanged.

To resolve the situation, either more tax room can be made available for the provinces relative to the federal government, or some provincial powers can be shifted to the federal government where the revenue capacity of the income tax will brighten the financial picture over the next fifteen years. As these alternatives are considered, the complex interrelationship of constitutional and fiscal matters becomes clear. The available options pose several subsidiary but significant questions. What are the dangers of too much decentralization? What are the dangers of excessive centralization? For example, it has been suggested that, if the provinces have too much fiscal power, two great dangers will arise. First, the federal government will not be able to exercise control over the economy, and second, a so-called "tax-jungle" will emerge.

On the first point, the provinces and the municipalities already account for 80 per cent of public investment. Thus, if the Government of Ontario, the Government of Quebec, Ontario Hydro, Quebec Hydro, the City of Toronto, the City of Montreal, and three or four other large public agencies chose to behave in a way contrary to federal fiscal policy, they could virtually offset the intended effects of that fiscal policy in the central part of Canada. The question of a "tax-jungle" similarly cannot be ignored. The federal government has told the provinces to raise their own taxes. While this may not have been an implicit invitation to the provinces to devise independent systems in total disregard of the existing system, such a situation could result. Under these conditions, there would be an urgent need in this country for increased cooperation and coordination among all governments.

No matter how complete the new distribution of powers, how clear the distinctions, or how many of the present problems are solved, grey areas, duplication, and uncertainty will continue to exist to some degree. Water-tight compartments of administration have never existed and they appear to be impossible to attain. As the role of government widens in response to public demand, its tasks will inevitably grow more complex and more intertwined, necessitating increasing intergovernmental contact. If we can avoid constant arguments about the sharing of taxes, we might, once and for all in Canada, settle down to the basic question of working together on budgetary coordination, cooperative economic planning, and integrated fiscal policy. All governments now anticipate greater expenditure requirements than their revenues will sustain. Thus, now more than ever before, they require machinery for the coordination of

priority-setting and budget-making. This view may offend the traditionalists, since it could result in the slaughter of all manner of sacred cows such as budgetary secrecy; however, the cows may simply be too expensive to maintain. One thing is certain: the need for coordination will not disappear no matter how successful the constitutional review is in rewriting or revising the distribution of powers.

By the same token, the face of federalism in Canada can be altered more effectively and more surely through fiscal and financial policy changes than by countless man-years of constitutional revision. Our constitutional tasks will be made easier or more difficult depending upon our success in maintaining a federalism, in the financial and economic realms, which is truly responsive to our national needs, which contributes to our maturing national identity, but which also respects the regional characteristics of our country.

The solutions to these many complex problems will be difficult to find. In publishing this second volume of the Ontario Advisory Committee on Confederation, we hope that the stock of information available to the Canadian people for analyzing the problems and devising solutions to them will be significantly enlarged.

Five years have passed since the Committee was established in January 1965. In looking back over this period, I am amazed at the number of significant developments that have occurred which have affected our federal system. When Volume I of the Committee's *Background Papers and Reports* was tabled in the Ontario Legislature in April 1967, the now familiar process of constitutional review was not yet under way. At that time, however, the need to undertake a careful analysis of Canadian federalism was recognized by a growing number of Canadians. In its preliminary report, the Royal Commission on Bilingualism and Biculturalism expressed the view that there was a growing crisis in Canada. Separatist sentiment was increasing in Quebec. The federal and provincial governments were engaged in a crucial series of financial negotiations which often gave the appearance of an angry confrontation. The Atlantic provinces were insisting that a serious effort be made to solve their problems of economic underdevelopment. In the West, there appeared the first signs of what has come to be called "western alienation". Taken together, these events produced a growing feeling of uncertainty in many parts of the country. Somehow our future seemed unsure and threatening.

It was against this background that the Committee met to advise the Government with respect to matters relating to the position of Ontario within Confederation and with respect to the constitutional requirements of Ontario. Until this time, very little work of this kind

had been done on a sustained basis at the provincial level. Because much of the work of the Committee broke new ground, it was often of an exploratory and tentative nature. It is particularly interesting to look back on Volume 1 of *Background Papers and Reports* and to recall the Committee's discussions before 1967. Even at that time, one could appreciate the members' early perception of many of the underlying issues of Canadian federalism. Several of the subjects treated in that volume had received little attention in Canadian literature on federalism. Many of them, however, can now be found on the agenda of the constitutional review.

During the past three years there has been a gradual change in the emphasis of the Advisory Committee's work. As a result of the decision in February 1968 to undertake the constitutional review, the Committee's agenda has been influenced by the priorities and work schedule of the Constitutional Conference and its attendant committees and subcommittees. The Committee's work has evolved in another direction, too. Increasingly, the members have been called upon to comment on papers prepared by the Government's staff advisers. There is no doubt that materials subjected to the scrutiny of the Committee have emerged as stronger and more tightly reasoned documents. We have experienced few tests more intellectually rigorous than those to which the Committee has subjected these materials. Moreover, circumstances have often required this advice to be rendered on extremely short notice.

The articles in this second volume reflect the subjects which the members of the Committee have discussed during the past three years. Articles on the Supreme Court of Canada, the Senate, and the entrenchment of fundamental rights represent some of the specific topics considered by the Committee in response to the demands of the constitutional review. In addition, the articles in this volume reflect the differences in opinion and philosophy that characterize the Committee's discussions. In the process of our deliberations, all of us have been educated, but we can only report individually to what degree this group education has altered or reinforced our previous opinions.

I believe that it is worth reiterating a comment that I made in the introduction to Volume 1. The members of the Advisory Committee have been appointed to *advise* the Prime Minister of Ontario on questions relating to Ontario's role in Confederation. Naturally, the Government is free to accept or reject the advice of the Committee as a whole or of its individual members. It was understood at the time of their appointment that they were men of strong and differing views regarding the problems of Confederation. The different philosophies of federalism that they hold have been put to the test in the course of their debates.

For the Government of Ontario and its officials, these deliberations have proved invaluable in preparing for the federal-provincial constitutional meetings at which a similar range of opinion is often present.

As a result, it is not surprising that many of the members would not agree with the theses advanced in many of the articles of Volume 1 or Volume 2. Nor is it surprising that articles on the same subject often arrive at different conclusions. In this sense they faithfully reflect the differences of opinion that exist within the Committee.

Three of the papers in this volume were commissioned by the Committee. Professor R. L. Watts, who wrote "Second Chambers in Federal Political Systems", is Dean of the Faculty of Arts and Science at Queen's University. Professor Ronald G. Atkey, the author of "Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism" and "The Provincial Interest in Broadcasting under the Canadian Constitution", is a member of the Faculty of Law at the University of Western Ontario. The article, "What Is Wrong with the British North America Act?", was prepared while Mr. Clifford Magone was still a member of the Advisory Committee.

In the summer of 1965, Mr. Justice Bora Laskin, now of the Supreme Court of Canada, resigned when he was appointed to the Bench. In 1969, three additional members of the Committee resigned as a result of ill-health or because of the pressure of other duties. Dean Richard Dillon of the University of Western Ontario, Mr. Clifford Magone, Q.C., a former Deputy Attorney-General of Ontario, and Reverend Lucien Matte, S.J., of Laurentian University gave us the benefit of their advice and experience for almost four years. On behalf of the other members of the Committee, I wish to express my gratitude to each of them for their contributions to our work.

It should also be noted that the Government receives information and advice from many sources outside the Committee. Statements by elected members from all legislative bodies in Canada, articles in the press and a wide variety of journals, books and television programs, and contributions of all kinds from citizens across Canada comprise part of the steady flow of material which is carefully taken into account. These sources must remain anonymous here, but their contribution has not been overlooked.

Finally, I am sure that I speak for all members of the Committee when I acknowledge how much we appreciate the behind-the-scenes support we have received from within the public service, and which continues to be essential to the progress of our work. In this regard, many individuals — too numerous to cite separately — are involved, but I would like to single out a few. My colleague, the Deputy Minister of

Justice, Mr. A. R. Dick, Q.C., has been and remains an especially thoughtful associate. The former Assistant Deputy Minister of Justice, Mr. F. W. Callaghan, Q.C., gave generously of his knowledge and intelligence. We have also had immense assistance from our past Co-Secretaries, Mr. D. W. Stevenson and Mr. R. A. Farrell, and the former continues to be an energetic contributor to our discussions. A few months ago, the Director of the Federal-Provincial Affairs Secretariat, Mr. Edward D. Greathed, was appointed as our Secretary, and it is he and his cheerful staff who continue to assist us in so many ways. These individuals have lightened my duties as Chairman and, along with my fellow Committee members, have made the position an agreeable responsibility as well as a rare privilege.

September 1970

H. Ian Macdonald
Chairman

Ontario Advisory Committee on Confederation
BACKGROUND PAPERS AND REPORTS
VOLUME 2

Regionalism and Confederation

Paul W. Fox

The term "regionalism" is very vague and subject to many different interpretations. Traditionally Canada has been conceptualized as a country divided into geographic, climatic, economic, and political regions. With the recent attention paid to the development of natural resources and to economic planning, we are now becoming familiar also with the concepts of resource regions and economic development regions. But this adds to the confusion in the use of the term. Obviously, there may be many different kinds of "regions", and many different ways of classifying each kind. An illustration may be taken from a recent book on regional and resource planning in Canada, which reproduced a number of papers presented to the Resources for Tomorrow Conference in 1961. In it two of the authors stated:

. . . In Canada, we may expect a system of about 400 provincial economic areas or Local Geographic Areas which can be combined into the various basic resource or Geographical Regions pointed to in the first part of this paper, or into the 241 Counties or Census Districts, 265 Economic Zones, or 66 Provincial Economic Regions.¹

There then follows a listing of the sixty-six provincial economic regions that have been selected in this case as the proper subdivisions of Canada, including ten for each of Ontario and Quebec chosen by the respective governments. These are not necessarily the demarcated regions that someone else might have selected for the same purpose, nor likely the regions that the same authority would have chosen for a different purpose.

¹ N. L. Nicholson and Z. W. Sametz, "Regions of Canada and the Regional Concept" in R. R. Krueger, F. O. Sargent, A. de Vos, and N. Pearson (eds.), *Regional and Resource Planning in Canada*, Holt, Rinehart and Winston, Toronto, 1963, p. 17.

To take another example, if one wishes to talk about political regions in Canada, he must decide immediately what it is he means to discuss. Is he talking about regions as equivalents of provinces, as groups of provinces, or as parts of a province or provinces? Or selecting smaller units of government, is he discussing regions as equivalents of counties, districts, or municipalities, or any combination or part thereof? It is possible, for example, to think of a political region in Canada that would be interprovincial, intermunicipal, and multiple-county at the same time. Professor Rowat's study of a federal capital territory for the Ottawa-Hull districts involves this mixture.²

All this is put forward not to show that political scientists can be as clever as philosophers at playing the game of linguistic analysis, but to indicate that at the moment in Canadian political science the term "regionalism" can mask a plethora of different forms and shapes.

In an article on the subject of regionalism in Canada, Professor J. E. Hodgetts remarked that "the concept of region viewed from the national perspective in Canada lacks the substance . . . that may be claimed for it in the United States".³ (That is putting it modestly.) He elaborates as follows:

In Canada . . . we are far less clear about the existence of regions with identifiable interests separate from the interests historically contained in and expressed through provincial units. In the First Annual Review of the Economic Council . . . we find the "regions" entitled Atlantic (with a footnote to say Newfoundland is excluded), Quebec, Ontario, Prairies, and British Columbia. This nomenclature, which is quite typical, reveals how quickly we exhaust the regional concept when applied across the nation: once the Maritimes and the Prairies have been mentioned, we immediately fall back on the standard political, provincial boundaries.⁴

As might have been suspected from the length of my discussion of this term "regionalism," I have had an ulterior purpose in mind. I wanted to justify its use in this paper in the way in which Professor Hodgetts explains it — in short, as a near synonym for "provincialism" and "interprovincialism". This seems sensible in view of the way in which the word "regionalism" is conventionally understood in Canada; and this interpretation will lead directly to the conclusions to be made at the end of this paper.

² D. C. Rowat, "The Proposal for a Federal Capital Territory for Canada's Capital" in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Vol. 1, Queen's Printer, Toronto, 1967, pp. 215-282.

³ J. E. Hodgetts, "Regional Interests and Policy in a Federal Structure", *Canadian Journal of Economics and Political Science*, Vol. XXXII, No. 1, February 1966, p. 10.

⁴ *Ibid.*, p. 9.

The Argument

The gist of the argument in this paper is that the course of Confederation from 1867 to 1967 has been characterized by an oscillation in the assertion of political power between the federal government and the provinces; that at the present time the pendulum of power is swinging strongly in favour of the provinces; and that therefore it would be wise for us to adjust our thinking and our governmental processes to accommodate the realities of this contemporary trend. The solution for the present period is, in my opinion, to seek to achieve a flexible sort of federalism that allows the federal government to make different arrangements with different provinces, according to the needs of the situation. Inevitably, this will lead in many cases to a regional point of view.

Alternations in Federal-Provincial Power

It is common knowledge that since 1867 there has been an ebb and flow in the assertion and exercise of power by Ottawa and the provincial capitals. Undoubtedly the central government consistently has had the advantage in this flux of power. As all students of Canadian history realize, the distribution of powers between the federal and provincial governments, as outlined by the British North America Act, gave the edge to the federal government. Definite psychological advantages accrued to Ottawa from this allocation, as well as from the fact that the dominion government was the symbol and focus of new national ambitions and that it was staffed by the most eminent political luminaries of the day. But although the new political system established by Confederation was tilted in favour of the federal government, the bias has not prevented an alternation in the assertion of power by Ottawa and the provinces.

We are all aware that Sir John A. Macdonald regarded the provinces as little more than mere municipalities catering to local needs, and that he would have preferred a legislative union, in which there were no provinces at all, to a federal system of government that gave the provinces a quasi-independent existence. Judging by the cheers in the Legislative Assembly that greeted his affirmation of this faith,⁵ it appears that many of his colleagues held a similar view. In light of this and of the factors already noted that inclined the new federal system in favour of the dominion government, it is not surprising that the period immediately following Confederation was marked by a vigorous display of federal activity, initiative, and power.

⁵ See P. B. Waite (ed.), *The Confederation Debates in the Province of Canada, 1865*, The Carleton Library, No. 2, McClelland and Stewart, Toronto, 1963, p. 40.

In the 1880's, however, the scales began to tip in the other direction. A number of significant constitutional decisions rendered by the Judicial Committee of the Privy Council had the effect of enlarging the provincial grant of powers. At the same time, a number of strong provincial premiers appeared on the scene, several of whom exercised much power for rather long periods of time. Mowat, who headed the Government of Ontario very effectively for twenty-four years, was perhaps the most impressive. But one should mention also Norquay, who was premier of Manitoba from 1878 to 1887; Fielding, who was premier of Nova Scotia from 1884 to 1896; Blair, Premier of New Brunswick from 1883 to 1896; and Mercier, premier of Quebec from 1887 to 1891.

When Laurier became Prime Minister of Canada in 1896, the flow of power began to reverse direction again, in part because Laurier performed one of the neatest manoeuvres in the Canadian balance of power game. He struck at the pinnacles of provincial power by persuading three leading provincial premiers — Mowat, Fielding, and Blair — to desert their local summits for positions in his federal "Ministry of All Talents", thereby deftly decapitating these prominent provincial regimes and transferring much of their strength to his government. (A comparable manoeuvre today would be for Robert Stanfield, when successful at the polls, to invite Premiers Robarts and Smith to join him in his Cabinet at Ottawa.) Laurier gave additional momentum to his federal administration by reviving the image of Ottawa as the nation-builder. In a manner reminiscent of Macdonald's National Policy, he embarked on a program of additional transcontinental railway construction and massive immigration.

The pendulum of political power and prestige that had been swung towards Ottawa by Laurier remained fixed there during the First World War by dint of the national emergency, the Union government, and the leadership and extraordinary powers exercised by Ottawa during the period of belligerency.

With the return of peace, power began to ebb away again from Ottawa and to flow towards the provinces. The process of change took some time to run its course, yet it was apparent in a number of events. The wartime coalition government began to disintegrate. Its leader, Borden, resigned to be replaced by Meighen, whose government was defeated in the election of 1921. King, who had been elected to succeed Laurier as the leader of the Liberal party, became Prime Minister. But a new element had entered the federal scene. The Progressive party, recently created to speak for farmers in particular, had elected sixty-four members of Parliament, more than a quarter of the total membership of the exist-

ing House of Commons. In a House whose members were divided among four parties, the Progressives held the balance of power. For the first time in the history of the federal government, the Prime Minister was faced with the problem of leading a minority government. Moreover, all three of the administrations that succeeded this one at Ottawa during the decade of the 1920's — King's second and third governments, and Meighen's short-lived acting ministry — were minority governments also. Although minority governments are not necessarily weak by nature, those that held office in Ottawa during the 1920's were noted neither for their vigorous accomplishments nor for their stability. In the decade between the beginning of July 1920, and the end of August 1930, Ottawa ran through six different governments, and none of them left an impressive record.

In contrast to this instability at Ottawa, a number of provinces displayed a notable degree of constancy. Premier Taschereau had commenced his long reign of sixteen years in Quebec, the local Liberal machine was digging itself solidly into power in Saskatchewan, and its counterpart in Nova Scotia was rounding out an uninterrupted record run of forty-three years in office. At the same time, the farmers' parties were accomplishing even more at the provincial level than the Progressives were federally. The United Farmers of Alberta won power at Edmonton, where they were destined to remain in office for fourteen years. The United Farmers of Ontario gained power in that province, albeit briefly, while in Manitoba a professor of agriculture, John Bracken, headed a Progressive party government that was to rule for twenty-one years.

The attention of voters was attracted towards their provincial capitals, particularly in Alberta and Manitoba where the farmers felt that at last they had elected governments sympathetic to their interests. Moreover, a great wave of popular democracy swept the West, stimulating the public's civic consciousness. Spreading into Canada from the American mid-western states, it carried with it such ideas of direct democracy as the initiative, the referendum, and the recall. These popular innovations swirled about the provincial capitals rather than about Ottawa, leaving their legacy in the adoption of the single transferable voting system in provincial elections and proportional representation in some western municipalities.

During the 1920's also the powers of the provincial governments were strengthened indirectly by decisions of the Judicial Committee of the Privy Council in three important cases. In the *Board of Commerce Act* case, *Fort Frances Pulp and Power Co.*, and *Toronto Electric Commissioners*, the Privy Council whittled down the general peace, order, and

good government power of the federal government so that it was interpreted to apply only in emergencies.⁶ This had the effect of extending the authority of the provinces in periods of normalcy.

The Great Depression of the 1930's brought this phase of provincial ascendancy in the cycle to a halt. The bottom dropped out of the economy, and economic recession had devastating political effects at the provincial level of government especially, changing the balance of power in the federal system. The provinces, which were responsible for the relief of the unemployed, were faced with paying the staggering costs of aiding the distressed in a protracted period of mass unemployment that at its peak reached one-third of the labour force. With dwindling revenues, with high fixed charges on capital debts incurred during prosperity, and without benefit of an adequate existing social welfare system, the provinces were very hard hit, particularly in the West where the boom of the 1920's rapidly turned into the monumental bust of the 1930's, aggravated by a decline in the wheat market, crop-failure, and drought. Western provincial governments teetered on the brink of bankruptcy. Alberta, in fact, went under, and its bonds had to be bailed out by the dominion government.

It is no exaggeration to say that the psychological effects of this sudden reversal of fortune were traumatic. In the West the sudden descent from the dizzy heights of prosperity to the hard rocks of depression was more precipitous than in other regions, such as the Maritimes, where economic stringency was not unfamiliar and the increased misery was a matter of degree. In a province like Manitoba the abrupt knocking out of its economic underpinnings instilled a dread of insecurity that is still evident in its readiness to depend on federal financial assistance today. Big Brother at Ottawa, with superior financial resources, had to be relied on to provide funds for relief cheques to keep body and soul together when the more vulnerable provincial governments had found their cupboards bare.

The legacy of this circumstance is discernible in the attitude of many Canadians today, particularly of those who are more than forty years of age and remember the Depression. They tend to regard Ottawa as a more effective guardian of their welfare than their provincial government.

This umbilical attachment to the core of government has a long history in Canada. It dates from the beginning of the French colonial regime with its highly centralized, absolutist administration, carries through the period of British Imperialism to Confederation, and con-

⁶ For the three cases and the judgements, see Peter H. Russell (ed.), *Leading Constitutional Decisions*, The Carleton Library, No. 23, McClelland and Stewart, Toronto, 1965, pp. 23-46.

tinues to the present. In the first century of Confederation, for example, the Maritimes and the territories continually have looked to the federal government for sustenance, amply fulfilling the prediction Christopher Dunkin made in 1865, that "the legislatures . . . will show a most calf-like appetite for the milking of this one most magnificent government cow".⁷

But it was the Great Depression that made the tradition into a living principle for the elder statesmen who govern Canada today. They accepted as part of the conventional wisdom of all time that the federal government is somehow inherently superior to all other governments in Canada. Since they had learned the hard way that financially it was the central government that could do things for Canadians, it was not difficult for them to believe that morally this ought to be so.

This attitude was reinforced even further by events in the 1940's. The Second World War gave Ottawa new prestige as the heart of the national war effort. The federal government became the physical guardian of Canadians, as well as their chief economic guarantor. In view of the national emergency the provincial governments themselves acknowledged the superiority of their federal rival and abstained from exercising their full powers. As a result of this voluntary restraint and of the logic of the emergency situation, the federal government acquired and exercised great powers such as it had not enjoyed before. The provinces surrendered their rights under section 92 of the B.N.A. Act to collect direct taxes (personal and corporate income taxes and succession duties) and turned over these lucrative sources of revenue to Ottawa in return for guaranteed payments. (The first two taxes in particular are so lucrative that they alone have supplied about half of the federal government's income in recent years.) In addition, Ottawa imposed a number of rigorous controls on the country (registration of citizens, conscription, and labour direction) and on the economy (restrictions on wages, prices, foreign exchange, and on the manufacture, allocation, and consumption of commodities). At the same time Ottawa began to move into the field of welfare, inaugurating unemployment insurance and family allowances. It was a harbinger of things to come that the federal government established in 1944 the Department of Health and National Welfare, which was to become soon the third largest public spending agency in the country.

All of these factors meant that Ottawa was in a very strong bargaining position when the war ended and an attempt was made to readjust federal-provincial relations in accordance with peacetime conditions.

⁷ P. B. Waite, *op. cit.*, p. 122.

Naturally, Ottawa had a somewhat different view than the provinces, especially the richer provinces, of what the respective roles of the two jurisdictions should be. The argument revolved, in particular, around the question of what the proper function of the federal government was in the fields of economic stabilization, social welfare, and tax-gathering. That these were all interrelated, in the opinion of the federal government's senior advisers from the civil service at any rate, became evident in the elaborate proposal they submitted for adoption to the first postwar federal-provincial conference in 1945.

Ottawa presented to the Dominion-Provincial Conference on Reconstruction a comprehensive plan for intergovernmental relations in the new era of the welfare state that would have put the federal government in the driver's seat in the administrative machinery. Without going into detail, one can say that these "Green Book" proposals incorporated some of the features of the recommendations made in the monumental *Report of the Royal Commission on Dominion-Provincial Relations* (the Rowell-Sirois Report), tabled in 1940 but never implemented because of the war.

The "Green Book" plan in 1945 proposed that the provinces give up all of the existing statutory subsidies that they received from the federal government and surrender permanently their right to levy income and corporation taxes and succession duties. In return Ottawa would assume all existing provincial debts, take over the cost of providing relief for all unemployed employable persons, and pay the provinces a "national adjustment grant" of fifteen dollars per capita based on provincial population. These proposals were similar to the major recommendations in the Rowell-Sirois Report, except that in the Report the grant was to be based on need rather than on a fixed per capita sum.

The Green Book, however, went far beyond the Rowell-Sirois Commission in suggesting a vastly expanded role in social welfare for the federal government. The latter now offered to pay all the costs of old age pensions for Canadians seventy years of age and more, to share equally with the provinces the cost of pensions for those from sixty-five to sixty-nine, and to sponsor a joint health insurance plan for which Ottawa would pay 60 per cent of the cost. In addition, the federal treasury would contribute to provincial and municipal public works programs if these were undertaken when Ottawa believed such "pump-priming" was necessary to stimulate the national economy.

The richer provinces, especially Ontario, objected strenuously to what appeared to them to be Ottawa's high-handed attitude in desiring to appropriate provincial tax fields, to invade provincial welfare jurisdiction, and to make the decisions by itself in launching public works

programs. The federal government defended itself by arguing that in the new postwar world Canada must have a minimum standard of social welfare in poorer regions as well as wealthier, that it alone could perform the task of establishing and maintaining such a national standard, and that to do so it must have the assurance of being able to manage the economy by controlling the economic levers, including the regulation of the level of taxation throughout the country and the determination of the timing of public works programs.

I have dwelt on this argument because it reveals the basic problem that has underlaid the continual conflict in federal-provincial financial relations from 1945 to the present day. The point at issue can be summed up briefly in the form of a question: Is the federal government to continue to play the Big Daddy role it assumed during the Second World War, or are the provinces — especially those straining to develop their economies — to be given more responsibility in taxation, in running their own affairs, and in determining the state of the economy? As for their control of social welfare, it is beyond dispute that constitutionally the area belongs to the provinces. Whether or not it is best in practical terms that they should administer all welfare programs is another question.

An important ingredient of this controversy is the element of ideology involved. The federal government's dogmatic dedication to the principle that it must have the power to control the economy stemmed largely from the Keynesian economic convictions of its leading civil servants. Many of these advisers had entered the ranks of the federal public service in the late 1930's and 1940's as bright young men who either had studied at the feet of the great English economist, John Maynard Keynes, at Cambridge or had absorbed his doctrines from the definitive book he had published in 1936.⁸ Keynes argued that to avoid a repetition of the catastrophe of the 1930's it was necessary for governments to play a major role in stabilizing the economy; to control its vagaries by intervening to prime the pump with lower interest rates and taxes and greater public spending on public works in periods when recession threatened; and, conversely, to drain off excessive purchasing power by means of higher taxes and interest rates and reduced governmental expenditure in periods threatening inflation.

Keynes' disciples in Canada took this to mean that the federal government must maintain the great powers that it had acquired during the Second World War over the economy, taxation, welfare, and public expenditures. Since the theory fitted neatly with the recent mushroom growth of both the federal government's powers and the welfare state, it

⁸ J. M. Keynes, *The General Theory of Employment, Interest, and Money*, Macmillan, London, 1936.

looked as though history, and maybe heaven too, were on the side of the Keynesians and of the federal government.

Perhaps it is too invidious to say that Keynes was to the federalists what Marx was to the proletariat, but the impact of the ideology of Keynesianism cannot be discounted in explaining the course of Canadian federalism in the past twenty-five years. It accounts for the rigid and righteous obstinacy with which federal advisers, in the face of adversity, provincial opposition, and constitutional contradiction, have held to their view that Ottawa must retain the dominant upper hand in fiscal, economic, and even welfare matters. It also accounts for the inability of the provincial governments to drive home their case for a change in the balance of power. They had no effective ideological counter-theory to displace Keynesianism; moreover, the doctrine was so convincing, pervasive, and fashionable that the provincial policy-makers believed it themselves and could not escape the haunting suspicion that the conclusions drawn in Ottawa as to the need for federal supremacy were probably correct. It is perhaps significant that the most effective check to Keynesian centralism has come from Quebec, where another ideology, nationalism, has provided sufficient strength to ensure progress in the achievement of some provincial goals. But over the rest of Canada the cloud of Keynesianism still hangs. Like all great intellectual theories, Keynesianism became diffused at the public level into a popular cultural myth which few understood but most accepted. This myth lives on in the notion that somehow the federal government inherently is, and ought to be, superior to provincial governments.

Of course, there was another reason for wanting to believe this. As the war drew to a close, everyone, provincialists as well as federalists, thought that there would be a catastrophic depression after hostilities ceased and that on the precedent of the Great Depression it would be the federal government that would have to cope with it.

The depression did not occur. Instead, the economy kept on booming and growing after the conflict ended and Ottawa, still armed with its wartime taxing powers, reaped a bountiful financial harvest. The federal government decided to spend this on further incursions into the social welfare field. In company with many other wartime governments, Ottawa had sustained military and civilian morale during the conflict by promising a new social order when victory was won. Britain had had its Beveridge Report, proposing social security from the cradle to the grave, and Canada had produced its Marsh Plan, holding up much the same ideal. Now was the time to deliver. The first installment came at the Dominion-Provincial Reconstruction Conference in 1945 with the Green Book's proposals for health insurance and improved old age pensions.

In the last twenty-five years, the federal government has fleshed out its welfare program even further, with veterans' rehabilitation schemes, health grants, hospital insurance, disabled persons' benefits, youth allowances, contributory pensions, the Canada Pension Plan, student loans, retraining programs, and commitment to the introduction of a national medicare plan with the provinces. In addition, the federal government during the last decade has penetrated deeply into the field of post-secondary education, subsidizing it heavily.

The first tax rental agreement entered into by the federal government with the provinces in 1942 was to last for five years. Since then Ottawa has renegotiated tax agreements with the provinces every five years on expiry. Although a progressive series of alterations has steadily increased the amount of independence the provinces have and the amount of money they receive, Ottawa has been left in effective control of the determination of the levels of income, corporation, and estate taxes, and has enjoyed the lion's share of the proceeds from the first two.

Although the total sum of money transferred by the federal treasury to the provinces appears to be gigantic (amounting to nearly five billion dollars in 1969-70), it is not by any means all a gratuitous gift from Ottawa. About one and a half billion of this sum is "tied money" in that it goes in the form of grants-in-aid to the provinces for shared-cost programs (chiefly welfare items, such as hospital insurance) that the provinces receive only if they agree to the conditions laid down by Ottawa and usually only if they pay a stipulated percentage of the costs of the program out of their own pockets. The largest portion of the total, about \$2.6 billions in 1969-70, consists of the amount that Ottawa turns back to the provinces as the latter's share of the combined "take" from income, corporation, and estate taxes. This sum is collected by the federal government on behalf of the provinces, but it actually belongs to the latter as the proceeds of the levy of their own personal and corporation income taxes. It is the remaining, and smallest, portion of the five billion total, amounting to an estimated \$788 million for 1969-70, that comes to the provinces as a more gratuitous gift from Ottawa in the form of equalization payments and statutory subsidies.

These arrangements have given Ottawa the initiative and control in the introduction of welfare measures. They have also provided the bulk of federal revenue from direct taxes, despite the fact that the constitution clearly assigns welfare to the provinces and just as clearly gives the provinces the right to levy direct taxes. It is no wonder then that some of the provinces, especially the richer ones, have become increasingly irked by the federal government's proclivity for monopolizing the direct tax field and launching new welfare programs, for which it takes the political

credit, while calling the tune for them and paying their costs out of what the provinces claim to be their revenue resources.

Although the federal government is now trying under most recent arrangements to phase out the shared-cost welfare programs by terminating its conditional grants and giving the provinces an equivalent in increased percentages of the proceeds from personal and corporation income taxes, some of the provincial governments are less than ecstatic. They object in part because Ottawa announced the change in an abrupt "take-it-or-leave-it" manner without negotiating the details with them, but more particularly because Ottawa still refuses to acknowledge the provinces' need for greater revenues in general.

Some of the affluent provinces feel that this is typical of the superiority complex that Ottawa has developed during the period of its ascendancy since 1930. They resent this attitude because it injures their pride. But they have a more fundamental objection. They believe that Ottawa's claims to superiority have been eroded considerably by changing circumstances in the past decade. They are of the opinion that the scales in the balance of power between the federal and provincial governments recently have been tipping significantly in favour of the provinces, and that Canada has entered into a new phase in federalism in which the recent long period of domination by the central government is coming to an end and the provinces are once again acquiring the initiative.

There are a number of reasons for believing that this assessment is correct, and that we have reached a point in the transition of power at which it would be wise to adjust the federal system of government in Canada to accommodate the change. The reasons for the change will be summarized briefly and then some proposals for accommodation will be suggested.

Reasons for the Contemporary Change in Balance of Power

Undoubtedly a large number of factors account for the current swing in the pendulum of power away from Ottawa towards the provincial capitals, but several seem to be obvious. For convenience they are divided into two groups: those that have arisen within the federal sphere, and those that have developed in the provincial context. Of the two, the provincial are probably the more important.

Federal Factors

1) In the past decade, Ottawa has had a prevalence of minority governments. Six elections within eleven years have resulted in the election of

four minority governments. While I do not agree with the common easy assumption that minority government means weak government, I think it is true to say that the repetition of minority results at least reveals that there has been no great degree of popular attachment to any federal party and that there has been no Canadian political consensus coming to focus at Ottawa. Prime Minister Trudeau's achievement of winning a majority of seats in the 1968 election might seem to disprove this allegation, but the fact is that he won only 45.5 per cent of the popular vote. The prevalence of minority governments at Ottawa has been in contrast to developments at the provincial level (to be elaborated later), and it weakened Ottawa's position vis-à-vis the provinces in a fashion reminiscent of similar conditions in the 1920's, which were previously explained.

2) The lack of consensus at Ottawa arises in large part from the regionalization that has developed within federal political parties in recent years. Although our parties claim to speak for the whole country, each is confined to certain distinct regions and groups in terms of most of the members of Parliament they elect and the bulk of the support they receive.

Under John Diefenbaker's leadership the Conservatives became primarily a western and rural party. Of their ninety-seven M.P.'s elected in 1965, forty-two came from the three prairie provinces alone, where the party was very strong indeed. Most of the rest of their M.P.'s were elected from rural ridings in Ontario and the Maritimes. The party did extremely badly in large urban centres, winning no seats at all out of eighteen ridings in Metropolitan Toronto, none in Vancouver, and one out of twenty-one in the Montreal district. While the party's new leader, Robert Stanfield, has sought to change this pattern of support, the results of the 1968 election showed little alteration. There can be no doubt that the past decade has witnessed the transformation of the national Conservative party into a highly regionalized party, somewhat similar to the "up-state" Republican party in the U.S.A., appealing to rural, white, Anglo-Saxon Protestants.

The Liberals have become regionalized also, but in just the opposite direction. They have done very well in recent elections in urban ridings, especially in Ontario and Quebec, but not at all well in rural and western constituencies. In 1965 the Liberals won only nine seats out of the seventy-two available west of Ontario. They were virtually wiped out in the prairies, in Nova Scotia, and in Prince Edward Island. Yet in urban centres they were very successful, particularly in cities with large New Canadian populations. Of the 131 Liberals elected in 1965, about eighty were from urban ridings, including fifteen out of eighteen possible from Toronto and twenty out of twenty-one from Montreal; both cities have a

large number of "ethnically sensitive" constituencies. These electoral results were confirmed by the outcome of the 1968 election. Mr. Trudeau improved the Liberal party's standing in the West, but he was even more successful in Ontario. The Liberals appear to be becoming the Canadian equivalent of the Democrats in the United States, appealing to large urban, cosmopolitan, Roman Catholic populations.

The New Democratic party also is highly regionalized. Nine of its twenty-one M.P.'s elected in 1965 came from Ontario, nine from British Columbia, and three from Manitoba. Virtually all of these were from urban ridings or from ridings with a large working class component. The NDP regained some seats in Saskatchewan in 1968 but retained its support in urban, industrial areas. The regionalization of Social Credit is obvious. Following the split in the party into English-speaking and French-speaking wings (which was a regional as well as an ethnic split), each faction became highly regionalized in terms of the M.P.'s it elected in 1965. Social Credit's five members came from rural Albertan and British Columbian constituencies that almost adjoin across the Rocky Mountains, while the Cr ditistes' nine M.P.'s were all elected from rural ridings in Quebec. In 1968 the English-speaking party was wiped out in the House of Commons, while the Cr ditistes acquired fourteen seats from rural Quebec.

3) A third factor weakening Ottawa's impact has been the instability that has developed in all of our federal parties during the past few years. If parties are to fulfil the role that political science traditionally assigns to them — namely, the function of being a unifying force by acting as a national broker to bring diverse and opposing interests together and by securing a consensus — then all the parties must be agreed within themselves on the fundamentals of their existence. Yet internal concord is precisely what has been lacking in our national parties in recent years. It is additionally debilitating that they have all been afflicted with major schisms at the same time. But perhaps it is not merely a coincidence. These splits may reveal the inherent weakness of the federal dimension in Canadian politics in the present period.

Whatever the cause for the general malaise, it is so obvious that one needs to mention the divisions within each party only briefly to recall them to people's minds.

The Conservative party, for example, was rent with arguments over John Diefenbaker's leadership; but the roots of the conflict went much deeper than the issue of one man's tenure of office. They lay in a dispute among regions over what the nature and direction of the Conservative party should be. Was it to continue to be what it had become recently, a sort of western agrarian party? Or was it to revert to its former long-

standing posture as an upper middle class, business-oriented, eastern Canadian party? The confrontation between Diefenbaker, the prairie progressive, and Dalton Camp, the central Canadian businessman, was no accident.

The federal Liberal party, too, has been plagued by divisions, which, if they are not as dramatic, are perhaps even more numerous. For example, there was the so-called "right versus left" (Sharp versus MacEachen) conflict over the date of the introduction of medicare; the Gordon-Winters controversy over American ownership of Canadian industry; the Thatcher-Gordon argument over curtailment of American investment of capital in Canada (a new version of the party's ancient internal battle over free trade versus the tariff, with the westerner typically in favour of free trade and the easterner favouring protection); and the English-Canadian and French-Canadian differences in points of view on a number of issues before the Cabinet.

In addition, electoral results and voting studies show that the Liberal party has gone through a great transformation in recent years, moving away from its original base of humble support in the rural and urban lower middle class to lean upon the more sophisticated and business-oriented upper middle class in larger cities.

The New Democratic and Social Credit parties also have gone through strange convolutions. Having begun thirty-five years ago as the CCF, which was notable as a western agrarian protest party dedicated to eradicating capitalism and inaugurating democratic socialism, the NDP from the day of its birth in 1961 has moderated its doctrines in an effort to broaden its appeal. Not much is left of its antecedent's socialistic dogmas. It has forsaken doctrinaire socialism (the word is not even mentioned in its official programs) and it seeks avidly to win middle class support in cities. Social Credit has gone through an even more amazing somersault in the same thirty-five years, swinging from a radical credo based on a highly unorthodox monetary theory to a conservative outlook in Alberta and British Columbia which is almost indistinguishable from that of right-wing free enterprise.

Thus all of our federal parties have become unstable as well as highly regionalized, and for a six-year period from 1962 to 1968 no party was able to win a majority at Ottawa. At the same time the provinces were gathering strength.

Provincial Factors

While there was a loss of momentum and almost a vacuum of power at Ottawa, there were a number of significant developments at provincial capitals that started the pendulum of power moving in their direction.

1) The most obvious of these, which probably everyone thinks of first, is the nationalistic revolution that commenced in Quebec in 1960. Although it is extremely important, I cannot begin to discuss it in detail here because of lack of sufficient space. I would like merely to state that I think it is important not only for its nationalism but because it is a modernizing revolution — an attempt to develop in modern industrial and social terms an entire province — and that as such it is a harbinger of what has been happening all over Canada in almost every other province. If this is true, it follows that even without pressure from Quebec we would have had enormous stresses and strains within our federal system at this time. The balance of power would likely have been tilted in favour of the provinces in any case, for a number of fundamental reasons examined below.

2) One curious factor that may be entirely fortuitous is that while Ottawa has suffered from an absence of secure leadership, the provinces have produced an extraordinarily high percentage of able and strong premiers. While one may not share their particular partisanship or approve of all their policies, one must admit that many of the provincial premiers who have been on the scene recently have been very capable, astute, and potent politicians. Among those who would be included on such a list, the names of Smallwood, Stanfield, Robichaud, Lesage, Johnson, Robarts, Roblin, Thatcher, Manning, and Bennett would be prominent. Perhaps the names of others who have come to power very recently would be added also, if the tenure of their office at the moment were long enough to permit an adequate assessment of their talents. It would raise a nice historical argument to ask if there has ever been before in Canadian history such a high percentage of skilful provincial premiers holding office in one decade. I suspect not. The closest one could come to it perhaps would be to refer to a period already mentioned in this paper, the early 1890's, which was another era marked by strong provincial power.

3) This degree of forceful provincial leadership has coincided with the existence of very strong majorities on the governmental side of the Legislatures in a number of the provinces. This no doubt accounts in part for the assurance and vigour with which some of the premiers speak and act. To take a few examples, in 1967 Messrs. Smallwood, Robarts, and Manning had huge majorities in their Legislatures (thirty-nine to three, seventy-seven to thirty-eight, and fifty-five to ten, respectively) to lend them weight in their tugs-of-war with Ottawa. In addition, by 1970 Smallwood has ruled for twenty-one years in Newfoundland, Bennett for eighteen in British Columbia, Robichaud for ten in New Brunswick, and

Robarts for nine in Ontario. With these long periods in office behind them, they are not apt to feel insecure in their own capitals.

4) The fourth factor is to my mind the most important of all in explaining why the pendulum of power is swinging towards the provinces. Since the end of the Second World War, there has been a dramatic upsurge in the significance of the functions of government assigned by the B.N.A. Act to the provinces. Three in particular stand out: education, highways, and welfare. A fourth, health care, may be grouped with welfare. The first three, at least, are clearly provincial powers according to the Constitution, and all three have undergone mushroom-like growth in the past few years.

The causes of this sudden increase are not hard to find. They are accounted for by at least the following factors. First, the rapid rise in the birth rate after the war has brought hundreds of thousands of additional children into the educational system in recent years, necessitating enormous expenditures on the construction of schools and the provision of facilities, on the employment and training of teachers, and on the development of adequate technical, professional, and academic institutions, especially universities. Enrolment in Canadian universities has increased from 63,000 in 1952-53 to 230,000 in 1966-67. It is projected that university enrolment will amount to 550,000 in 1976-77. Second, our modern society has required the construction of thousands of miles of good, hard-surfaced, and expensive highways to ensure rapid transportation for both economic and social purposes. Third, citizens all across Canada have come to expect more and more benefits from the welfare state, such as hospital and medical care, higher old age pensions, disabled persons' allowances, and more aid to students.

It is the provinces that have had to bear the burden for most of these snowballing obligations, and whatever their own personal opinions about increasing expenditures have been, the premiers have had to face a genuine demand by their own voters for such services. They have had little option but to acquiesce. After all, what politician can say "no" these days to a public outcry for such worthy goals as better and sufficient schools, university education for all who are qualified, hospital and medical care, or "a mile of blacktop"? They have become universal "goods", like peace and motherhood.

As a result of these demands, provincial expenditures have skyrocketed. Since the pattern is much the same across the country, I shall take only two examples to illustrate the general trend. Ontario is spending in 1969-70 almost three billion dollars. That is nearly six times as much as it spent only thirteen years earlier; or, to put it another way, it

represents an increase in expenditures of approximately 500 per cent in little more than a decade. In terms of a twenty-five-year period it represents an increase of more than 2,700 per cent between 1943 and 1968. My other example, Alberta, presents an equally startling contrast. In the year 1944-45 Alberta's total governmental expenditures amounted to fifty million dollars. By 1968-69 they had reached \$893 million, an increase of nearly 1,700 per cent. In 1966 the provincial treasurer pointed out that the current budget was "approximately equal to the combined total of all the budgets of the province from [its birth in] 1905 to 1947 . . .";⁹ or in other words, in 1966 Alberta was spending in one year as much as it had in its first forty-two years.

Provincial spending *in toto*, exclusive of transfers, almost quadrupled between 1945 and 1955, and then more than trebled again between 1955 and 1965. The overall increase in twenty years was approximately 900 per cent. In contrast, in the same period federal spending, exclusive of transfers to other governments, increased by only 68 per cent.

The reasons for these colossal increases in provincial spending are also quite similar in all the provinces. They arise from vastly increased expenditures in the three fields noted previously. Perhaps one set of examples is sufficient here to depict the general point. In 1969-70 Ontario is spending \$472 million on highways compared to \$197 million in 1956-57, an increase of 140 per cent; but the rise was even more evident in the other two areas. The province is spending \$1.3 billion this year on education, including universities, in comparison to \$111 million thirteen years previously, an increase of 1,044 per cent in less than a decade and a half. On health and welfare Ontario is expending \$475 million this year compared to \$103 million in 1956-57; this amounted to an increase of 360 per cent in thirteen years.

If one adds together the amounts Ontario has spent on these three functions (highways, education, and health and welfare) for any one year in the last ten and then calculates them as a percentage of the province's total expenditures for that year, he will discover that Ontario's spending on these three areas during the past decade has been running at 75 to 80 per cent of the province's total annual budget. The relevant percentages for other provinces have been approximately the same.

It is clear that the provinces, by force of contemporary developments, have become committed to enormous expenditures that are still rising and that consume a very large proportion of their total budget. One can

⁹ Hon. A. O. Aalborg, Treasurer of the Province of Alberta, "Budget Speech", Third Session, Fifteenth Legislature, 1966, p. 3. For data on the finances of all provinces, see *Provincial Finances, 1969*, Canadian Tax Foundation, Toronto, 1969, especially Chapter 14.

understand, therefore, why the provincial premiers are desperately concerned about either getting more money from Ottawa or, alternatively, obtaining control of a greater percentage of the revenues from their own direct income and corporation taxes. (They could, of course, raise their own taxes in these fields and have Ottawa collect them on their behalf, but the political repercussions from their own electorates likely would be so adverse that this policy does not appeal to them.) One can also see why the premiers are disturbed by the prospect of allowing Ottawa the opportunity to introduce, without consulting them, new welfare programs that the provinces would have to find additional funds in part to pay for. A recent example of this concern is the appeal to Ottawa launched by all the premiers attending their annual conference at Fredericton in 1967 to postpone the introduction of medicare.

The huge growth in provincial spending since 1945 in fields that touch vitally the lives of so many citizens is the major reason for the current shift in the balance of power in our federal system from the central government to the provinces. The plain fact is that the provinces have become much more important to Canadians than they have ever been. They are no longer merely glorified municipalities, as Sir John A. Macdonald thought of them, nor even "junior" governments compared to the "senior" government at Ottawa, although these words are still used by some people who continue to think in terms of the by-gone era of the 1930's and 1940's.

5) The unsuitability of these terms becomes evident if one studies the relevant facts and figures. The words may have fitted the situation two decades ago, when under wartime pressure the federal government's share of total government expenditures in Canada rose to as much as 87 per cent in 1944; but they certainly do not apply accurately to the spending pattern today.¹⁰ Indeed, the relationship is just the reverse. It is the provincial governments and municipalities (which under our Constitution are, of course, the creatures of the provinces) that together have become the big spenders among Canadian governments.

The latest figures available indicate that in 1969-70 the federal government is spending \$11.6 billion dollars, exclusive of transfer payments to other jurisdictions, while the provinces are spending ten billion and the municipalities an additional three billion, exclusive of transfers. In fact, the so-called "junior" governments have been spending more than the "senior" government since 1961, and there is no indication that that pattern will change in the near future. One study predicts that by 1980 there will be a return to the prewar position and each of the three

¹⁰ For quoted and relevant statistics, see *Provincial Finances, 1969*, and *The National Finances, 1969-70*, Canadian Tax Foundation, Toronto, 1969.

jurisdictions will be spending about one-third of the total;¹¹ or in other words the provincial governments in particular will have responsibility for about two-thirds of public expenditures in Canada.

6) An important consequence of this huge expansion in provincial expenditures has been the growth in the number and quality of provincial civil servants. Between 1944 and 1969, for example, the number of Ontario's departmental employees shot up from 7,712 to 56,000, an increase of 628 per cent in twenty-five years. In the shorter period of seven years, between 1959 and 1966, Alberta's leaped from approximately 10,000 to more than 21,000. While numbers in themselves are not an index of efficiency, it is widely recognized that the quality of provincial employees has improved greatly as well. The governments of Quebec and Ontario especially are noted for having deliberately pursued lately a policy of recruiting able young professionals to plan programs, give advice, and staff the services the provinces are now providing.

The possession of expertise is vitally important to any government in the period of complex economic and social development that we have entered in the modern welfare state. But it is all the more important to the provinces because it enables them to cope with the recent rapid growth in their functions and also to bargain more effectively with Ottawa. The federal government for years has had an excellent civil service that has given it an edge in dealing with the provinces, which have been less well endowed in this respect. Now a new generation of young provincial "technocrats" is being assembled to redress the balance. They are playing a significant role in helping to swing the pendulum of power towards the provincial capitals.

This point has been elaborated in much more detail in a very perceptive and persuasive article published in 1966 by two professors of political science from the University of British Columbia.¹² While lack of space here does not permit inclusion of their arguments, it is noted in passing that they advance the same view as that expressed in this paper — namely, that the cycle of federalism is bringing the provinces into ascendancy in the present decade. Referring to this matter of the rise of provincial bureaucratic elites, the authors comment, "Probably the most important aspect of province-building concerns the growth of influential provincial elites in politics, administration, and resource-based industries."¹³ They note also that the opinions expressed earlier by some

¹¹ David Ivor, "General Expenditure Analysis" in *Report of Proceedings of the Fourteenth Annual Tax Conference*, Canadian Tax Foundation, Toronto, 1960, p. 103.

¹² See E. R. Black and A. C. Cairns, "A Different Perspective on Canadian Federalism", *Canadian Public Administration*, Vol. IX, No. 1, March 1966, pp. 27-44.

¹³ *Ibid.*, p. 40.

Canadian political scientists — for example, Professor J. A. Corry¹⁴ — to the effect that the pressure of business elites and the requirements of national regulation of an interdependent economy would bring about a greater degree of centralization have not been borne out by developments since then. On the contrary, as Professors Black and Cairns observe, “political integration is not an inevitable consequence of urbanization, industrialization, and rising standards of living”.¹⁵ Decentralization has been, in fact, the outcome of these trends.

7) In their comment on elites, quoted in part above, the co-authors mention the importance of the growth of resource-based industries as a factor augmenting provincial powers. The point is well taken. The vigorous upsurge in the exploitation of our natural resources (such as petroleum, gas, forest products, minerals, and hydro-electric power) since the end of the Second World War has profited the entire country by contributing to the great boom in national prosperity that we have enjoyed in this period. But the political and economic benefits of this development have rubbed off on the provincial governments more than on the federal government.

There are several reasons for this. For one, natural resources are under the jurisdiction of the provinces according to the Constitution, and this gives the provinces the right to manage them and to tax them. There is both prestige and profit in this power. Alberta, for example, has derived a good deal of political capital out of the self-alleged shrewdness with which its government has negotiated publicly beneficial leases with private companies exploiting petroleum resources. The Alberta government also has obtained an enormous amount of revenue from natural resource industries in recent years. The latter now furnish 59 per cent of the government's total revenues, and Alberta is in the luxurious position of being the only province that does not have to levy a sales tax. No doubt this happy financial condition has helped the Alberta government to win friends and influence people in successive elections. In fact, it probably goes a long way in explaining why the government party has remained solidly in power for thirty-five years.

But the advantages accruing to the provinces from the splurge in the development of their natural resources is not just a matter of dollars and cents gained in revenues. The provinces profit also from being identified with the glories of the resources boom. Thousands of good jobs are created in the resource industries themselves, and in the service and

¹⁴ J. A. Corry, “Constitutional Trends and Federalism” in Robert M. Clark (ed.), *Canadian Issues: Essays in Honour of Henry F. Angus*, University of Toronto Press, Toronto, 1961, pp. 3-22.

¹⁵ E. R. Black and A. C. Cairns, *op. cit.*, p. 39.

secondary manufacturing industries that spring up locally to support them. New and valuable skills are attracted to both private and public employment in provincial centres. This expansion fosters in turn a general mood of optimism, buoyancy, "good times", and excitement among voters, which some provincial politicians are quick to cash in on by thumping the drum of provincial loyalty and by calling elections to endorse the government that hath wrought such miracles. In the electoral activities that ensue, moreover, it is now possible for the provincial party in power to exercise a degree of independence that it did not formerly possess, since the existence in its own bailiwick of large prosperous resource industries permits it to solicit campaign funds locally without having to depend on the good offices of the national party.

If all this seems rather fanciful and exaggerated, I would invite you to review the provincial scene and to note the validity of the following observations. The provinces have become obsessed, as perhaps we all have, with the goal of rapid economic development, especially in the field of exploiting natural resources. The mania is pervasive and consuming, affecting virtually all the provinces whether they are rich or poor, large or small, or even predominantly French-speaking or English-speaking. One hears on all sides of strenuous efforts and grandiose plans to develop provincial resources: dams in British Columbia, potash in Saskatchewan, iron ore in Quebec, heavy water in Nova Scotia, hydro-electric power in Labrador, and so on.

Almost every province has recently created a ministry for stimulating the exploitation of these resources, in whole or in part, while a number of the premiers themselves have taken on the job of being supersalesmen of their provinces' economic potential. In typical fashion, Mr. Smallwood is his own minister of economic development, flying about the world like a capitalist tycoon, wheeling and dealing in Newfoundland's resources. Messrs. Bennett, Thatcher, Campbell, Smith, and even Schreyer are somewhat less peripatetic but no less interested. Messrs. Robarts and Strom are more decorous, but perhaps only because they feel that they already have it made. Backing up the efforts of the premiers and the ministers are an array of enthusiastic civil servants and a plethora of councils, boards, and agencies, public and private, devoted to economic development, planning, and productivity.

The passion of the provinces for economic development is so great that it has led a number of the governments to make bombastic, "nationalistic" (more properly stated, "provincialistic") demands upon the federal government for more money, greater powers, and sometimes quasi-independence to provide the sinews for continued growth. These assertions are perhaps not too surprising when they emanate from the more

flamboyant premiers for whom they are stock in trade; but it is startling and revealing when as sensible and as modest an individual as the present premier of New Brunswick makes a remark about provincial rights and natural resources such as that attributed to him in 1967. If Mr. Robichaud was quoted accurately, he said in reference to the recent controversy before the Supreme Court between the provinces and the federal government over which authority owns offshore minerals rights, "If the decision goes against us, we just won't recognize it."¹⁶

Summing up, it appears from this analysis that the rapid development since the Second World War of natural resources within the jurisdiction of the provinces has been a very significant factor in swinging the pendulum of power away from Ottawa towards the provincial capitals. It is probably second in importance only to the vast increase in provincial expenditures in the same period.

8) There is one final factor that should be mentioned in any explanation of the increasing stature of the provinces in the current era. It may be dealt with under the term "cooperative federalism". While this development is very important, it is not possible for reasons of lack of space to describe it in detail here. I would refer those who wish to know more about its theoretical principles to a definitive article written by one of its architects, the Honourable Jean-Luc Pepin.¹⁷ There is not yet available in published form an equally instructive and thorough review of the application in practice of its principles, but several sources provide some useful information.¹⁸

Cooperative federalism is, in brief, the effective working together of governments in Canada to achieve mutually advantageous goals. There have been many different manifestations of this procedure in recent years. Usually it involves the meeting together of comparable officials from the federal and provincial governments for purposes of discussion and joint decision-making. A meeting may consist of those at the highest

¹⁶ Quoted in the *Toronto Daily Star*, August 2, 1967.

¹⁷ J.-L. Pepin, "Cooperative Federalism" in Paul Fox (ed.), *Politics: Canada*, 2nd ed., McGraw-Hill of Canada, Toronto, 1966, pp. 79-86.

¹⁸ See D. V. Smiley, "The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism", *Canadian Journal of Economics and Political Science*, Vol. XXVIII, No. 1, February 1962; D. V. Smiley, "The Two Themes of Canadian Federalism", *ibid.*, Vol. XXXI, No. 1, February 1965; D. V. Smiley, "Public Administration and Canadian Federalism", *Canadian Public Administration*, Vol. VII, No. 3, September 1964; J. R. Mallory, "The Five Faces of Federalism" in P.-A. Cr peau and C. B. Macpherson (eds.), *The Future of Canadian Federalism*, University of Toronto Press, Toronto, 1965; E. Gallant, "The Machinery of Federal-Provincial Relations: I", and R. M. Burns, "The Machinery of Federal-Provincial Relations: II", *Canadian Public Administration*, Vol. VIII, No. 4, December 1965; and R. I. Cheffins, *The Constitutional Process in Canada*, McGraw-Hill of Canada, Toronto, 1969, Ch. 6.

plane, prime ministers and ministers, or of senior civil servants such as deputy ministers, or of almost any rank of public servant who finds his government profits from his working directly with his opposite numbers in other governments. It is obvious that the complexities and problems of our modern professional, technological, and bureaucratic age are so great that any federal system needs a large dose of such cooperation among its federal and provincial officials if it is to function satisfactorily. Since personal consultation is a practical way of achieving this goal, it is not surprising that an extensive substructure of meetings on many subjects has grown up. In the last eight months of 1966, for example, there were more than a hundred meetings of officials slated, dealing with all sorts of subjects ranging from the federal-provincial tax structure to poultry breeding.¹⁹

The development of this kind of cooperative federalism in Canada has strengthened the provincial position vis-à-vis the federal government in at least two ways. First, it has given the provinces a greater voice in the determination of policies and practices that affect them. While that voice is still not as influential at Ottawa as the provinces would like it to be, it provides at any rate a greater opportunity for the expression of provincial interests than anything that existed previously. The growth of federal-provincial conferences in recent years as a means of settling problems of mutual concern is a good example of the increased scope given to the provinces for making their views felt. These conferences are of sufficient importance that they merit greater attention here; but in the interests of brevity I shall merely remark that they have been of particular significance in the discussion and resolution of very important fiscal, welfare, and constitutional issues.

Cooperative federalism has a second dimension that benefits the provinces. Although it is thought of generally in terms of the relations between Ottawa and the provincial governments, it can be interpreted to include the relations among the provincial governments themselves. There has been a vast expansion lately in the amount of consultation, cooperation, and coordination that goes on among provincial officials and departments; it is especially noticeable in such fields as education, welfare, agriculture, law enforcement, securities' regulation, and highway construction. The exchange of information and opinion and the coordination of policies and standards are increasing all the time. A web of cooperative interrelationships among provincial governments is growing up to undergird the structure of federalism. Sometimes the provincial interrelationship is nation-wide, as in the cases of the development of

¹⁹ See *The Financial Post*, May 21, 1966, for an itemized list.

annual meetings of the premiers and the creation in June 1967 of a Canadian Council of the Ministers of Education. On occasion it is regional, as in the instance of the annual holding of a conference of premiers of the Atlantic provinces, the establishment of an Atlantic Provinces Research Board and the Atlantic Provinces Economic Council for regional development, tri-provincial support of the Maritimes Transportation Commission, or the creation a few years ago of the Prairie Economic Council.

On the whole, however, it cannot be said that regional developments have accomplished a great deal yet, in terms of either those among the provinces themselves or those that stem from federal policies slanted towards a particular area. The federal government has attempted to do more for regional development than the provinces themselves. In recent years, for example, Ottawa has invested hundreds of millions of dollars in special grants to the Atlantic provinces, in the Atlantic Development Board, and in the Agricultural Rehabilitation and Development Agency (ARDA).²⁰ In 1969 Ottawa pushed its policy of regional expansion even farther by creating a department devoted to regional economic development and endowed with a very generous budget. It will carry out its policies by cooperating closely with both provincial and local authorities.

While cooperative federalism, therefore, is developing in Canada, so far it has affected and benefited the provinces mainly as individual entities rather than as regions.

Conclusions

The major conclusion is that for all the reasons enumerated previously, it seems that we have entered a period in which power is flowing away from Ottawa towards the provinces. This is part of an alternating process that has characterized the history of Canadian federalism since Confederation. The present phase of growing provincial authority dates from the conclusion of the Second World War but has become especially significant in the last decade. It is impossible to estimate how long it will last or what its final political and economic repercussions will be, but the previous cycle of federal ascendancy prevailed for approximately

²⁰ For a more detailed discussion of these programs and of regional developments in Canada, see H. J. Whalen, "Public Policy and Regional Development: The Experience of the Atlantic Provinces" in A. Rotstein (ed.), *The Prospect of Change*, McGraw-Hill of Canada, Toronto, 1965, pp. 102-148; several articles in *Canadian Public Administration*, Vol. IX, No. 2, June 1966; and T. N. Brewis and G. Paquet, "Regional Development and Planning in Canada: An Exploratory Essay", *Canadian Public Administration*, Vol. XI, No. 2, Summer 1968.

twenty-five years. It is likely that we have not yet reached the zenith of the current period of provincial power.

Regionalism is a concept capable of many definitions; but if one adopts the common interpretation that it implies — the grouping together of provincial areas for common purposes — there is little evidence that this has yet happened on a grand scale. Some attempts are being made in that direction now in certain specific instances, partly as an outcome of the contemporary development of cooperative federalism, but there is no indication that we have come anywhere near the point of creating another significant jurisdiction of government between the federal and the provincial. As yet, regions in Canada remain very close to synonyms for provinces. At most they are administrative or economic concepts, created by political policies.

For all these reasons the problem of federalism in Canada continues to be a problem in the adjustment of relations between the federal government and the provincial governments. At the moment, there appear to be three different ways in which these adjustments could be dealt with.

First, one might refuse to make any significant changes, adhering to present arrangements and trying to maintain the status quo. This appears to be generally the policy of the present federal government, which at the federal-provincial fiscal conference in the fall of 1966 took the hard line that all provinces were to be treated equally (i.e., there was to be no "special status" for Quebec) and that the provinces were not to be given any more money or any greater voice in affairs than they now have. This course seems to me to be tempting fate by ignoring the trend in current Canadian history. It might well lead to some kind of rupture sooner or later, since the dynamic forces in the provinces are too strong to be contained rigidly without modifications.

Second, one might give the provinces their head and let contemporary centrifugal developments carry them out as far as they wished to go. This would be self-defeating from the point of view of the national interest, since it likely would result in some kind of serious fragmentation — separatism, associate statism, or something analogous.

Third, one might review the trend in the current phase of Canadian affairs and noting the gravitation in power towards the provinces, attempt to devise elastic policies to fit the situation. To my way of thinking, this means giving the provinces greater fiscal resources to meet their present needs and also extending to them a more significant role in determining national policies that affect the provinces — in short, expanding cooperative federalism even further. In the process it is inevitable that certain provinces will have "special (or particular) status" in certain regards, not necessarily in the same respects but in the matters that are of peculiar

concern to them. Actually, we have always had a measure of "special status" in the operation of Canadian federalism. The Atlantic provinces, for example, have received special fiscal grants; Quebec has had protection of its linguistic and religious differences; the West has enjoyed special freight rates; and Ontario has had the benefit of a national tariff. I cannot see why we should now try to reverse the traditional pragmatic policies applied throughout the history of Canadian federalism, particularly when contemporary events require an even greater measure of their application. Let us make whatever arrangements are necessary with each province to satisfy its interests and to maintain some semblance of overall cohesion without worrying about uniformity. What does it matter how odd the pattern of Canadian federalism is, so long as the components are reasonably satisfied and there is a measure of justice for all?

In conclusion, then, what I propose is a policy that could be called pragmatic, flexible federalism. How this would be applied in detail is a subject for another paper.

Geo-Politics and the Canadian Union

John Conway

The position of the Prime Minister of Canada vis-à-vis the provincial premiers has changed radically since 1867. At the Federal-Provincial Conference in Ottawa in February 1969, it was apparent that Prime Minister Trudeau had no primacy conceded to him as of right. In fact it was doubtful whether he was considered *primus inter pares* by any except those heads of provinces who still regard themselves as premiers rather than prime ministers. To the disinterested observer Trudeau appeared to have only that authority which he could establish by reason of his own powers of intellect and personality. Did Trudeau still consider himself the "new boy", as he had described himself at the Commonwealth Conference? Did he recognize that his office is no longer what it was and decide to act accordingly? Whatever the reason, the tone he set was different from that set by Lester Pearson at the 1968 conference. Pearson had tried to be the leader. He had told the conference that a new creative act of statesmanship on a national level was essential, implying that the British North America Act had outlived its usefulness. What was at stake, he said, was the very survival of Canada as a unified political society.¹

¹ Opening statement by the Prime Minister of Canada, the Right Honourable Lester Pearson, Constitutional Conference, Ottawa, February 5, 1968.

We all know that French Canada today feels a deep dissatisfaction with its place in Confederation. The reasons for that are complex and of varying significance. I have said in the past and I repeat now that I believe most of those reasons to be entirely justified. But this is not the occasion either to try to analyze why there is discontent in French Canada or to weigh judiciously everything that has contributed to produce that result. What is far more important is to admit that this dissatisfaction is a fact and to recognize that, if it is allowed to continue

At the conference in 1969, Trudeau became a negotiator, dealing with the delegates on a less abstract level. The idea of a nation with something distinctive to contribute to the world in the way of political institutions was lost sight of, if in fact it ever came up. Instead the emphasis was shifted by the provinces to money and regional development, and by Ottawa to the rights of individuals. Trudeau spoke not of abandoning the British North America Act in favour of a new "act of accommodation" (to use Pearson's phrase), but of revising the Constitution. It should be modernized, he said, to conform with contemporary realities. His greatest concern, however, was to safeguard the interests and the rights of the citizen, and to ensure that they had precedence over the rights of governments.² This admirable concern for individual rights is characteristic of Trudeau and his thinking (it is reflected in his proposed revisions of the Criminal Code). Nonetheless, one had hoped for something rather less atomistic in his view of Canada and Canadians. He made no reference to the past and, as far as I could make out, he had no vision of the future. In short Trudeau did not present us with any idea of how he expected Canada to develop over the next twenty or thirty or fifty years, nor did he attempt to define what the country might become.

The provinces were even less concerned with the concept of Canada as a nation, rather than as a collection of individuals and sectional interests. The opening statement by Saskatchewan's Premier Ross Thatcher made this perfectly clear. Thatcher said that in his view the constitutional problem was of secondary importance. The main problem, the

without remedy, it could lead to separation and to the end of Confederation. Equally important is to recognize that it lies within our power to prevent this, to remove the causes of discontent, to lay the groundwork for a new great act of accommodation which will ensure the hopes and aspirations of all Canadians. It is to nothing less than this that we must commit ourselves at this Conference. . . . Let me be explicit: what is at stake in my opinion is no less than Canada's survival as a nation.

² Opening statement by the Prime Minister of Canada, the Right Honourable Pierre Elliott Trudeau, Constitutional Conference, Ottawa, February 10, 1969.

Nous voulons reviser notre constitution. Nous voulons la moderniser, la rendre plus conforme aux réalités contemporaines. Mais notre véritable détermination, notre motivation profonde, c'est d'abord et avant tout de servir le citoyen, de sauvegarder ses intérêts, d'assurer la protection de ses droits et la réalisation de ses aspirations. Voilà notre préoccupation première, et qui nous est commune à tous. D'autant plus que tous ensemble nous représentons et servons les mêmes Canadiens. Les souverainetés peuvent bien être partagées entre divers paliers de gouvernement, mais le citoyen, lui, reste unique et indivisible. . . . Nous décidons de placer les droits fondamentaux du citoyen avant les droits des gouvernements. Voilà tout.

one that really mattered, was financial.³ Specifically, the allocation of taxing powers which was appropriate in the nineteenth century was not adequate to the needs of the provinces today. Walter Weir, speaking for Manitoba, agreed. It was not inadequacies of the Constitution that disrupted the unity of Canada, but lack of fiscal equity.⁴ The Premier of Alberta introduced a new and significant theme — that of regionalism. Increasingly over the past five years the problem of national unity has become much wider and deeper than the simple reconciliation of English and French. There are kinds of separatism in Canada other than that of Quebec. Harry Strom made this very clear. He told the conference that there was deep dissatisfaction among the people of western Canada about eastern unawareness of, or unconcern with, western problems and western aspirations. He accused central Canada of being either reluctant to admit or incapable of realizing what the West was, what it wanted, and what it hoped to be. Then he turned to a theme which is as old as the western provinces themselves but which gathers strength and seriousness as those provinces grow in wealth, population, and power: the issue of the tariff. The tariff was designed to protect the manufacturing interests of the East, without concern for economic ventures in the West. Consequently, benefits have accrued to few western industries. Moreover, said Strom, the tariff has been harmful to the economic progress even of the East, for it has encouraged a slackness in method and management that has put the country well behind the United States in the growth of the GNP and in the development of secondary manufacturing.⁵

³ Opening statement by the Honourable D. G. Steuart, Deputy Premier of the Province of Saskatchewan, Constitutional Conference, Ottawa, February 10, 1969.

... we come to this Conference somewhat in a spirit of impatience. We continue to believe that there are problems facing our people which have a far higher priority than constitutional reform, of the kind presently proposed by the Federal Government. We consider that the basic objectives of this Conference should be to settle the financial aspects of Confederation. The taxing powers that were appropriate for an earlier era no longer match the relative constitutional responsibilities of the different levels of government. We insist that financial difficulties facing all governments are today the major challenge to the continued existence of our Country — not the Constitution. Westerners are not impressed by the recent financial policies of Ottawa. To us they represent confrontation, shock treatment, further upward tax revisions, and interference in provincial tax fields.

⁴ Opening statement by the Honourable Walter Weir, Premier of the Province of Manitoba, Constitutional Conference, Ottawa, February 10, 1969.

... what is being eroded, and which (sic) must be protected now, while we await a new Constitution, is the ability of the Provinces to meet their constitutional requirements with the present tax base. The economic foundation of our Nation is threatened. The Federal Government has been aborting the present Constitution. The one matter, more than any other, which affects the unity of the Nation is the lack of fiscal equity, which is the basis of equality of opportunity.

⁵ Opening statement by the Honourable Harry E. Strom, Premier of the Province of Alberta, Constitutional Conference, Ottawa, February 10, 1969.

If the western provinces approached the question of regionalism from a position of economic strength, the Atlantic provinces approached it from a position of economic weakness. Premier G. I. Smith of Nova Scotia told the conference that regional disparities constituted a problem which was fully as urgent as the matter of language rights and culture. He assured the delegates that he neither advocated support for economically unviable industries, nor expected economic equality among the various regions of Canada. Some provinces are naturally richer than others. But the economic growth of the country as a whole is bound to be impeded if large sections of it remain permanently less productive

Let me say that it would be a tragic and profound mistake on the part of either the politicians or the press, or the general public of Central Canada to underestimate or dismiss out of hand the profound dissatisfaction which does exist among many people in Western Canada. There is a real lack of understanding and appreciation of our regional interests and problems and aspirations in other parts of this Country. We deeply resent the picture which is often painted of the West in the minds of the people of Central Canada.

Westerners are naturally concerned that minds which hold misconceptions may be reluctant or incapable of appreciating our dissatisfactions and our aspirations.

What Western Canadians legitimately desire, if economic justice is to prevail within Confederation, is that our raw resource industries be given the same priority as the manufacturing industries of Eastern and Central Canada.

We desire this equality of priority to be demonstrated, not simply in conference communiqués but in concrete ways. For example, when the Federal Government sets tariffs we would like to give full consideration not only to the needs of certain Eastern industries for protection, but equal consideration to the fact that the costs of these tariffs are to a large extent borne by consumers and Western industries, which must compete with high production costs and high transportation costs in an international market.

It is time the Federal Government recognized the harmful effect of the tariff system on the West, and indeed on the economic health of the nation.

Thirteen years ago Professor J. H. Young estimated for the Gordon Commission that the tariffs were costing the people of Canada one billion dollars a year.

No reliable figures on the current cost of the tariff system are available. But we have no reason to suppose the figure would be any lower.

It is true that the cost of the tariff system is borne by all Canadians. But not all Canadians benefit from it.

It was set up, as we all know, for the protection of secondary industry in Central Canada, chiefly in Ontario. Very few Western industries gained any benefit from it. And most ironically, the tariff system has failed to achieve its very objective of fostering Canadian secondary industry.

A study by Professor J. H. Dales of the University of Toronto showed some time ago that despite tariffs, Canadian economic growth has lagged behind that of the United States since 1870; that the ratio of our Gross National Product to theirs has fallen; that the ratio of our secondary manufacturing to theirs is no higher than it was in 1910.

... when future Constitutional changes or new national policies are proposed, we will examine them very closely to see if they provide expanded opportunities for the realization of the aspirations of Western Canadians.

than the others.⁶ Louis Robichaud was no less emphatic on this score. "Somewhere," he said, "words must be found that reconcile all Canadians to a sense of common responsibility for all . . . wherever they may live."⁷ It is interesting to contrast the regionalism of the West with the regionalism of the Atlantic provinces. Western regionalism tends towards autonomy verging on a kind of separatism. The regionalism of the Atlantic provinces of necessity relies upon a strong central power in

⁶ Opening statement by the Honourable G. I. Smith, Premier of the Province of Nova Scotia, Constitutional Conference, Ottawa, February 10, 1969.

Regional disparity is another matter which we believe should receive as urgent attention [as the matter of language rights and culture]. We do not believe that it will ever be possible to achieve absolute equality of development as between the regions of Canada or that we should try to do this. And we do not advocate any action which will slow down the development of those regions which are growing more rapidly, and continuing, as they do, to contribute to the nation as a whole.

Let me say, too, that we do not seek subsidization for unproductive economic development. What we are seeking is assistance in developing a viable economy of greater growth.

We believe that it is possible, desirable and necessary to reduce very greatly the disparities of development so clearly apparent as between regions. We also believe this can be done without slowing down the rate of economic growth in other regions.

Further, we believe it is clearly in the national interest to do this. We believe Canada can best develop her full potential if all regions are making their maximum contribution to the general growth. And this growth as a nation is bound to be impeded if large portions of the Country fall and stay substantially behind the rest of the Country.

The unity of Canada is threatened by regional disparity just as it is threatened by linguistic or cultural differences.

⁷ Opening statement by the Honourable Louis Robichaud, Premier of the Province of New Brunswick, Constitutional Conference, Ottawa, February 10, 1969.

Let us reflect for a moment on the special problem of regional disparities which played so important a part in the debate last February and which remain of vital interest to the Country as well as to all of the other Atlantic provinces.

I am very much aware of how difficult it is to convert this concept of regional disparity into constitutional terminology as such. I do not argue now, nor did I suggest earlier, that the constitutional régime of the future must somehow stipulate specifically that all regions shall be equal in their revenues or economic strength, governmental and individual. . . . But somehow this belief must pervade any reconstruction of the framework of Canadian society. Somewhere words must be found that reconcile all Canadians to a sense of common responsibility for all with minimum standards for all, wherever they may live.

Nature and accident have given advantages of resources and market location, of technology and opportunity, to some parts of our Country over others. Perhaps it is impossible to envisage the total balancing of these geographic, resource and technological inequalities. But not to recognize them, not to have a fundamental national policy about them, is to perpetuate inequality as an implied national pattern, yielding to nature and accident what should be overcome by effort and inventiveness. Without prejudging therefore what the Constitution will say, it is clear that New Brunswick must envisage national policies that deal vigorously with regional resource, capital or technical deprivation.

Ottawa. This stand was forcefully and intelligently expressed by the Premier of Prince Edward Island, Alex Campbell, to my mind one of the most impressive and promising delegates at the conference. Premier Campbell said that the federal government must have the means to deal effectively with the problem of regional disparities. At the same time he was not prepared to grant all power to Ottawa. There is a difference, he maintained, between a strong central government and a strong centralized government. In any event the balance between federal and provincial powers must be preserved. To illustrate his viewpoint, Campbell cited James Wilson, one of the Fathers of the American Constitution:

Wilson, in summarizing the constitutional dilemma which faced the United States in 1787, remarked that: "Each state endeavoured to cut a slice from the common loaf to add to its own morsel until at length the Confederation became frittered down to the impotent condition in which it now stands . . . what danger is there that the whole will unnecessarily sacrifice a part? But reverse the case and leave the whole at the mercy of each part and will not the general interest be continually sacrificed to local interests?"⁸

This quotation was apt and perceptive. That the idea of the primacy of the federal authority had been seriously eroded was clear throughout the conference. In fact it had been clear at the 1968 conference. The

⁸ Opening statement by the Honourable Alex B. Campbell, Premier of the Province of Prince Edward Island, Constitutional Conference, Ottawa, February 10, 1969.

. . . I would like to reaffirm our position on the need for a strong central government. At the Confederation of Tomorrow Conference I said, "Strength in this context means financial strength to provide a sufficiently large economic field within which to exercise political and economic influence towards national ends." I would add at this time that the Federal Government must have the means to deal effectively with the problem of regional disparities. Though we regard a strong "central" government as necessary, we do not necessarily support a strongly centralized government. The centralization of government operations has proven totally ineffective in correcting the regional imbalances which have developed over the years. I expect to deal with these questions at greater length during this Conference. However, before leaving the subject of a strong central government, I would like to sum up Prince Edward Island's position by quoting one of the Fathers of the American Constitution, James Wilson. Wilson, in summarizing the constitutional dilemma which faced the United States in 1787, remarked that: "Each state endeavoured to cut a slice from the common loaf to add to its own morsel until at length the Confederation became frittered down to the impotent condition in which it now stands . . . what danger is there that the whole will unnecessarily sacrifice a part? But reverse the case and leave the whole at the mercy of each part and will not the general interest be continually sacrificed to local interests?"

province of British Columbia⁹ and the province of Ontario¹⁰ each had asserted the primacy of the provincial jurisdiction in its own areas of competence, and its opposition to any effort on the part of the federal authority to encroach on that jurisdiction for the benefit of the general interest.

The reasons for this erosion of the federal authority are fairly clear. In 1867 the Atlantic provinces had substantial status arising from their respective histories. Nova Scotia had close ties with both England (Halifax was the base for a British naval squadron) and New England, and had developed a lively provincial culture. New Brunswick was the home of a large segment of the United Empire Loyalists; in fact, the region had been developed specifically to accommodate them. Charlottetown in Prince Edward Island was the locus for the conference which discussed the possibility of Confederation. Together the Atlantic provinces acted as the midwife at the birth of Confederation, and for decades they gave the nation many of its most important federal politicians (including three prime ministers). At the same time, the economic power of British North America was centred in Montreal and Toronto, and the initiative for federation came from Canada West and Canada East. The British North America Act was drawn up in the context of these historical facts. This setting, together with the disastrous example provided by the American Civil War, gave primacy (both in law and in fact) to the government in Ottawa. (Professor Alexander Brady makes this clear in his paper, *Federal-Provincial Conferences*, presented in June 1967.) In Sir John A. Macdonald's view, the functions of the provincial governments were limited strictly to matters of local concern, and the members of the dominion Parliament were the only provincial representatives in

⁹ Opening statement of the Honourable W. A. C. Bennett, Premier of the Province of British Columbia, Constitutional Conference, Ottawa, February 5, 1968.

The National Government's proposal to entrench certain areas of legislative capacity by their confinement within the formal words of constitutional enactment is not only a restriction of the principle of legislative supremacy, which has so far been the underlying philosophy of our parliamentary system, it is, as well, a drastic re-arrangement and reduction of legislative competence at the expense of provincial jurisdiction within Canada.

¹⁰ Propositions of the Government of Ontario submitted to the Continuing Committee of Officials on the Constitution as of December 1968.

The theory of federalism requires each order of government to act independently within its jurisdictions. Such independence is seriously impaired when one order of government must approach the other for financial aid to discharge its basic responsibilities, for its decisions are subject to review and to pressure for change by its pressing needs for funds. The net result is a blurring of the federal system's distribution of powers and a decrease in efficiency of government and in public satisfaction.

Ottawa. He rejected any idea of formal intergovernmental relationships between province and dominion.¹¹

For reasons which are not difficult to understand, this primacy continued until very recently. At the initiative of Ottawa, the Canadian Pacific Railway was completed and British Columbia thereby entered into Confederation. At the initiative of Ottawa, the prairie provinces, the Yukon, and the Northwest Territories were created. At the initiative of Ottawa, a great influx of immigrants from Great Britain and Europe was effected between 1896 and 1912. During the Laurier administration the country was linked together a second time by another transcontinental railway.

Much has been made of the importance of communications in bringing Canada together, but very little has been said about one particular kind of communications: that between men of common origin. As a unifying factor in the development of Canada, it has been extremely significant. To an important degree, leaders in the new provinces came from Ontario and the Maritimes. Until 1939 Vancouver, for example, was controlled financially and in the professions almost entirely by such men. Men who were born and educated in Ontario or the Atlantic provinces, then went to Winnipeg, Regina, Calgary, or Vancouver as doctors, lawyers, clergymen, merchants, bankers, school teachers, and university professors, thought of the West as an extension of the East. It was in their consciousness that Canada existed as a developing and unified young nation. Another notion of unity was provided by the immigrants from Great Britain at the turn of the century, at the height of British and European imperialism. For them, Canada was a unified colony, part of the Empire which welded into a higher unity all its constituent parts. These first generation immigrants to the West from Ontario and the Maritimes and from Great Britain are no longer effective forces in the country and soon will disappear altogether.

¹¹ Federal-Provincial Conferences, Preliminary Draft of a Paper by Alexander Brady, June 1967.

Joseph Pope tells us that Sir John A. Macdonald believed "that the functions of the Provincial Governments are strictly limited to matters of local concern, and that the only constitutional representatives of a province in its relations with the Dominion are the members of the Parliament of Canada from that Province." Pope's interpretation of his leader's view was not wild fancy. It is confirmed by Macdonald's own remark in a letter to the Lieutenant Governor of Nova Scotia in 1886 that "the representatives of Nova Scotia as to all questions respecting the relations between the Dominion and the Province sit in the Dominion parliament and are the exponents of the wishes of the people with regard to such relations." In brief Macdonald repudiated any idea of a formal system of inter-governmental relations, although in hard fact he was compelled to deal with individual governments on financial and other matters.

Given this background, it was natural that the primacy of Ottawa should be perpetuated by the centralizing needs of the two World Wars and the Great Depression. It is only in the past fifteen years that the position of Ottawa has — without intentional planning — been seriously modified. With the disappearance from the Canadian consciousness of the idea of both colony and nation, and with the gradual dispersion of the needs of the 1930's and 1940's, socio-economic and geo-political forces have operated freely to relocate power and authority.

Let me list a few symptoms of this change. French Canada can no longer be handled by the Prime Minister's Quebec lieutenant, as it could be as recently as the era of Mackenzie King and Lapointe. Ontario is the financial and industrial centre of Canada. The historical authority of the Atlantic provinces has vanished; they are Canada's poverty area, looking — as was apparent at the conference — not to Ottawa for assistance (except as broker) but to the rich provinces.

At the conference the prime ministers (rightly so called) of Ontario, Quebec, and British Columbia conducted themselves as representatives of semi-independent principalities. Why should they not? They represented great power and great riches, actual and potential, with none of the ambiguity that attaches to the federal government in the present state of our Constitution. The same is true, with some variations, of the representatives of Alberta, Saskatchewan, and Manitoba. Prime Minister Trudeau directed the conference with intelligence and skill. But we need only compare his attitude on this occasion with the attitude of the President of the United States towards state governors to see how changed our polity has become over the past decade. The presidency is the symbol of national unity. The prime ministership is not. In the past such a symbol was provided — rather dimly but effectively enough, considering our stage of development — by the British monarch, particularly if his representative in Canada was a member of the royal family. Today, however, we have no charismatic office in our governmental structure.

This is not to say that the decentralization of authority from Ottawa to the provinces is to be deprecated. Perhaps we have evolved a new and better system — certainly one corresponding more to the facts — than that devised in 1867. I do believe, however, that our Constitution should reflect the real situation.

The main fact is that we have no paramount central authority accepted unquestioningly as such from the Atlantic to the Pacific. This is the precise opposite of what was intended by the Fathers of Confederation. It is one of the ironies of modern history that the intentions of both the Fathers of the American Republic and the Fathers of the Canadian Confederation should have been so completely frustrated. Under the

American Constitution the authority of the central power was intended to be minimal. In fact today that central authority is imperial and neo-caesarist. Under the British North America Act the central authority was intended to be powerful so as to avoid the dangers to which states' rights seem to have exposed the Union. In fact today the central authority is uncertain and on the defensive, while the provinces — at least the rich and powerful ones — assert their rights with complete self-confidence. At the conference in 1968 Prime Minister Pearson was almost apologetic in his assertion of federal authority. He assured the provincial delegates that he would be open and receptive to the wishes and the proposals of every province, adding that he would have to draw the line somewhere.¹² Trudeau, then Minister of Justice, assured the conference that he had no intention whatsoever of taking any power *away* from the provinces. Quite the contrary, he was prepared to *surrender* some power to the people of Canada.¹³ Premier Robichaud thought that

... it is time for an honest examination as to whether the forms and symbols of 1867 are appropriate to the life, and times, and mood of 1968. We can all surely agree that the B.N.A. Act as a piece of prose, and as an exercise in symbolism, is deficient to the point of calculated boredom. (Perhaps it is a revelation of the Canadian character!)¹⁴

The Prime Minister of Quebec, Daniel Johnson, told the meeting flatly that the federal and provincial governments were equal. Relations between the two orders of government must be on a level of cooperation, not subordination.¹⁵

¹² Opening statement by the Prime Minister of Canada, the Right Honourable Lester Pearson, Constitutional Conference, Ottawa, February 5, 1968.

In our initial discussions this week the representatives of the Federal Government will, of course, be receptive to the wishes and open-minded to the proposals of every Province. But I would be less than candid if I failed to point out that there are certain Federal positions which must be maintained.

¹³ Statement by the Honourable Pierre Elliott Trudeau, Minister of Justice and Attorney General of Canada, on a Constitutional Charter of Human Rights. Constitutional Conference, Ottawa, February 6, 1968.

I wish to make it clear that in proposing this measure there is no suggestion that the federal government is seeking any power at the expense of the provinces. We are stating that we are willing to *surrender* some of our power to the people of Canada, and we are suggesting that the provincial governments surrender some of *their* power to the people in the respective provinces.

¹⁴ Opening statement by the Honourable Louis Robichaud, Premier of the Province of New Brunswick, Constitutional Conference, Ottawa, February 5, 1968.

¹⁵ Opening address by the Honourable Daniel Johnson, Prime Minister of Quebec, to the Constitutional Conference, Ottawa, February 5, 1968.

According to the principle of autonomy, member-states of a federation are given legislative and fiscal powers by the constitution itself and not by the federal state. Relations between the two orders of government must be on a level of co-operation, not subordination.

These reservations about the Constitution and this reluctance to recognize any paramount federal authority were repeated at the conference of 1969. The Premier of Nova Scotia spoke as an equal when he told Trudeau that there had been a lack of meaningful discussion between his government and the federal government. His language was not as precise as that of Daniel Johnson the previous year, but it was perfectly clear that he too believed that relations between the two orders of government must be on a level of cooperation.¹⁶ Walter Weir, perhaps without realizing the full implication of what he was saying (and this makes it only the more striking), questioned the authority of the federal civil service. It would be improper, he said for civil servants to make decisions or even to direct research in the constitutional review. This is to be reserved to the political leaders of the country.¹⁷ By "political leaders" it was apparent that he did not mean simply Prime Minister Trudeau and the members of his Cabinet. Alberta wished to see the decentralization of the Bank of Canada with real autonomy for the branches, so that they could devote themselves to the economic needs of their particular areas.¹⁸ Most interesting, British Columbia wished to federalize the Supreme Court of Canada, feeling that British Columbia members of the Court should take part in deciding cases in which the

¹⁶ Opening statement by the Honourable G. I. Smith, Premier of the Province of Nova Scotia, Constitutional Conference, Ottawa, February 10, 1969.

There is no point in dwelling on old grievances or refighting old battles, but, Mr. Prime Minister, I do wish to bring to your attention that at times in the past there has been a lack of meaningful consultation, and it should not carry on into the future if we hope to develop the degree of co-operation which is necessary to the harmonious workings of a federal union.

¹⁷ Opening statement by the Honourable Walter Weir, Premier of the Province of Manitoba, Constitutional Conference, Ottawa, February 19, 1969.

The Manitoba Government . . . proposes . . . that a new Continuing Committee of Cabinet Ministers from each of the jurisdictions be created to direct the course of constitutional investigation on which we are engaged. This committee, representative as it should be of the elected governments in the Provinces and in Ottawa, will be in a better position to undertake the continuing process of examination and assessment.

Obviously a staff of highly qualified civil servants must continue to undertake research and generally to service the work of the constitutional review. But it is improper for them to make decisions in this area or indeed to direct the research which must be the concern of the political leaders of the Country.

¹⁸ Opening statement by the Honourable Harry E. Strom, Premier of the Province of Alberta, Constitutional Conference, Ottawa, February 10, 1969.

The discriminatory nature of blanket monetary policy is one of the primary causes of the slow growth of secondary industry in the West.

In the United States the central bank is organized on a regional basis. Might not the same thing be done in Canada with real autonomy for regional branches of the Bank of Canada, which would enable them to take into account the unique economic needs of the areas they serve?

province was involved.¹⁹ Speaking for Quebec, Jean-Jacques Bertrand said simply, "... we need a completely new constitution, tailored to the ideas and needs of today."²⁰ In the *Working Paper on Foreign Relations* Quebec rejected the notion that under the present Constitution only the Government of Canada has power to make treaties in international law, and said further that even if this were true, it should be changed. The Paper also reminded the conference that thirty years ago the Government of Ontario had argued before the Privy Council the right of the province to advise the Crown in matters where its legislative powers apply.²¹ Quebec was not alone in questioning the sole competence of the federal government in the area of foreign affairs. Without going to the Cartesian extremes of the Quebec *Working Paper*, Harry Strom indicated that Alberta was as much concerned about foreign affairs as Quebec when provincial interests were involved.²² Many more examples of the absence

¹⁹ Opening statement by the Honourable W. A. C. Bennett, Premier of the Province of British Columbia, Constitutional Conference, Ottawa, February 10, 1969.

When the constitutional validity of a statute of a particular Province is in issue, British Columbia considers it desirable that those Judges appointed from that Province or from the region of which that Province is a part sit on the hearing of the case.

²⁰ Opening statement by the Honourable Jean-Jacques Bertrand, Prime Minister of the Province of Quebec, Constitutional Conference, Ottawa, February 10, 1969.

... we need a completely new constitution, tailored to ideas and needs of today.

²¹ Constitutional Conference Continuing Committee of Officials Working Paper on Foreign Relations. Notes prepared by the Québec Delegation, Québec, February 5, 1969.

The Canadian Government has sought to show that under Canada's present constitution only the Government of Canada has the power to make treaties at international law. We do not accept this conclusion. . . . We wish however to state that even if this were true under the present constitution, it should be otherwise in the new constitution. . . . We would do well to remember that Quebec is not the first province to seek a measure of international capacity. More than thirty years ago, before the Judicial Committee of the Privy Council, the Attorney General for Ontario put his case this way:

"There are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the Provinces have in some way come to be the Dominion Ministers. The Province has the right to advise the Crown in matters where its legislative powers apply. Ontario has a right to enter into an agreement with another part of the British Empire or with a foreign State."

²² Opening statement by the Honourable Harry E. Strom, Premier of the Province of Alberta, Constitutional Conference, Ottawa, February 10, 1969.

The Federal Government is not reluctant to take special steps to allow strengthening of relations between French-speaking nations abroad and the French parts of Canada, even to the point of increasing foreign aid to French Africa.

Let the Canadian Government send joint Canada-Quebec delegations to French educational conferences in Africa if that is what is desired by Canadians in one part of the country, but at the same time, let the Federal Government send new and stronger joint Canada-Manitoba, Canada-Saskatchewan, Canada-Alberta and Canada-British Columbia trade delegations to the nations of the Pacific community.

At the same time, to facilitate this policy shift, there should also be shifts in the

of a defined and accepted central authority can be found in the documents of both conferences.

Two further considerations should be introduced into this discussion. First, our political problems and troubles in Canada exist within, and are necessarily affected by, the wider context of world events in the final decades of the twentieth century. These are, and from all indications will continue to be, revolutionary years. One of the most prominent features of this revolution is the crisis in the legitimacy of authority. The authority of the church — since the middle ages the ultimate source of political and social stability — is being challenged. So is the authority of the university and of the state. In Canada, the revolution has its most vocal and colourful expression in the Province of Quebec, where federal authority is being questioned and rejected. But as I mentioned earlier, the problem is not confined to Quebec. In British Columbia, for example, the tendency is simply to ignore central authority whenever possible.

Second, Canada is a country of modest importance in relation to the rest of the world. We have so far displayed little creativity in philosophy, in literature, or in the arts that is sufficiently distinctive to attract a discriminating international audience, although the age of affluence and a habit of mutual congratulation sometimes obscure this fact. That we have been totally barren in the area of political theory is evident from the intellectual sterility of the British North America Act and from our surprising refusal to do away with it. For a brief time at the end of the Second World War we invented and gave meaning to the concept of the middle power. But that time soon passed, and our foreign policy became what it had always been, a policy of accommodation rather than of initiatives. This is well illustrated by the apparent intention of the present Prime Minister of Canada to withdraw from NATO without offering the western world any alternative political idea except the pious platitudes which were perfected by Mackenzie King and left by him as a legacy to his Party and his country. Provincial governments have been affected by this. After the disappearance of the British Empire, which had radiated some of its glory on Ottawa, it was only a matter of time until the constituent parts of Canada came to regard the central government in the manner it is regarded internationally.

personnel of some of Canada's trade and diplomatic missions, particularly in the Asian countries. Many Western Canadians are tired of going to Asian countries and meeting with well-meaning, but Eastern-Canadian-oriented civil servants who can relate the name of every major company doing business in Montreal or Ottawa or Toronto, but who have never heard of some of the international concerns of Winnipeg, Regina, Edmonton, Calgary or Vancouver. These people represent the interests of some Canadians, but they do not represent our interests.

It was clear at the conference that no single idea unifies this country. Even at the 1968 conference, where Prime Minister Pearson had done his best to remind his audience that man does not live by bread alone, the references to Canada were no more than platitudinous and money-conscious. Ross Thatcher of Saskatchewan commented:

At the outset of this conference may I say without equivocation that Saskatchewan favours a *strong central government*. In our opinion the federal administration must have adequate *financial* and *monetary* resources to cope with *economic recession*, to ensure *stable economic growth*, to combat either *inflation* or *deflation*.²³

That a central government might have some meaning other than that of a central bank did not occur to the Premier of Saskatchewan. However, Mr. Thatcher's less than Aristotelian view of politics should have come as no surprise. Two or three months earlier at Prime Minister Robarts' Confederation of Tomorrow Conference, the Attorney General of British Columbia, representing W. A. C. Bennett, announced that his province had a "pork chop" attitude to the problems that were about to be discussed. He added that Canadians were a practical people. If they found themselves to be impractical, he said, they went elsewhere. This left at least one member of his audience wondering who had been the most impractical — Harry Johnson, John Kenneth Galbraith, or Lord Beaverbrook. The contributions of the other delegates, although usually phrased with more elegance, were rarely on a much higher level of abstraction.

So it was at the conference in 1969. To be sure there was one brief aspiration expressed by Prime Minister Trudeau in his opening address:

Si nous voulons que ce pays soit un pays et non pas un agglomérat de territoires à administrer, nous devons pour lui donner une âme, reconnaître une fois pour toutes les principes et les idéaux qui sont communs et qui nous inspirent.²⁴

But these sentiments evoked no response from the provincial representatives, nor were they further elaborated by the Prime Minister. The appearance of a central authority conducting the sessions did not conceal the fact that in reality five different types of social and political regions were meeting there and asserting their individual needs.

There was British Columbia, which has never had any kind of traditional society except the surface Anglicisms once provided by retired

²³ Opening statement by the Honourable W. Ross Thatcher, Premier of the Province of Saskatchewan, Constitutional Conference, February 5, 1968.

²⁴ Opening statement by the Prime Minister of Canada, the Right Honourable Pierre Elliott Trudeau, Constitutional Conference, February 10, 1969 (unrevised copy).

British army and navy officers and retired British businessmen from India, China, and Southeast Asia — British Columbian types that no longer exist. British Columbia came into effective existence when the Canadian Pacific Railway reached Vancouver in 1886. A strong and lively capitalism from the beginning exploited the forests, the fisheries, and the mines there. Its expansiveness was halted by the two wars and the depression but resumed with the postwar technological revolution. Consequently, the most aggressive kind of capitalism is appropriate and at home in the province, and has been given full encouragement by the Social Credit government under W. A. C. Bennett. British Columbia has no past; it looks only to the future. Bennett's plans for a millenium of growth and prosperity for his province are more Californian than they are Ontarian, and indeed the social climate of the province resembles that of California more than that of the rest of Canada.

The prairie provinces form an area of agricultural capitalism, a distinctive combination of the rural anti-urbanism on which John Diefenbaker drew so strongly for support and the prosperity brought about by foreign wheat sales. At the conference the prairie provinces expressed a real distrust of the East. The remarks in this connection have been cited already, in the opening statement of the province of Saskatchewan. Premier Strom, speaking for Alberta, said:

We often get the impression that the national media and the representatives of the media in the large centres of Central Canada are not interested in the views of the representatives from the West. There is too little interest, it seems, in reporting the attitudes of our representatives in depth to the people of the nation as a whole, but particularly to the large population centres in Central Canada.²⁵

This feeling of lack of essential unity with central Canada was expressed by Manitoba's Minister of Finance in an address on February 17, 1969.

We are ready always to move towards unity. Our people would expect no less. The Conference on the Constitution sharpens the issues now. Many thousands of our people have heard the debate at first hand. They expect the federal partner — their federal partner — to meet the real needs of this country. If this is finally made clear to the federal authorities, then we can hope that before too much longer, Ottawa will move with us away from conflict toward compromise. The lesson taught by our history leaves no other choice.²⁶

²⁵ Opening statement by the Honourable Harry E. Strom, Premier of the Province of Alberta, Constitutional Conference, Ottawa, February 10, 1969.

²⁶ *The Threat to Canadian Unity — The Forgotten Lesson of Rowell-Sirois*, Address by the Honourable Gurney Evans, Minister of Finance for the Province of Manitoba, to the East Kildonan Kiwanis Club, February 17, 1969.

This offhand assumption of disunity between Manitoba and Ottawa is startling.

Ontario has two faces. It is the modern, highly urbanized industrial state, the industrial and financial centre of Canada, powerful and conscious of its power, believing that in the end where Ontario leads the rest of English-speaking Canada will follow (there is good reason today to question that belief). It is also Upper Canada, with all that the term implies. In contrast to British Columbia, Ontario does have a past and a tradition. It has families that have been rich and educated and rooted in the same place for generations. It has, with one or two Maritime exceptions, the oldest and most prestigious schools and universities outside the Province of Quebec. Ontario thus has much of the kind of confidence New York enjoys, as well as much of that found in New England. It is at the forefront in industry and finance; and at the same time it is aware that it and Quebec were the founding provinces of Confederation, and that it antedates Confederation.

The uniqueness of the Province of Quebec needs no emphasis. While other parts of Canada may have feelings of kinship with the United States or Great Britain, for Quebec there is nothing but Canada. In this sense Quebec is more purely Canadian than any of the other areas or provinces. This is why, despite the dazzling success of Expo '67, French Canadians did not see much to celebrate in the centennial year. "Were it repeated *ad infinitum*," said Daniel Johnson at the 1968 Conference, "no one — at least among my fellow Quebecers who have been here for over 300 years — could be made to believe that Canada began in 1867."²⁷ Quebec used to be a traditional Catholic society, religious and rural in its inherited ethos. It is now arriving in the twentieth century suddenly and with increasing acceleration. It is no longer rural in its outlook. It is questionable how religious it remains, particularly among the rising generation. Quebec has transferred to its distinctiveness as a *patrie* much of the commitment and intensity formerly devoted to religion. It has a stronger sense of self than any other part of Canada. On the first day of the conference the Quebec flag fluttered on the limousine of Prime Minister Bertrand as it drew up to the West Block. Not even Prime Minister Bennett's limousine carried such an insignia.

The Atlantic provinces, like Ontario, have a past and a tradition; but unlike Ontario, they are poor. At the Confederation of Tomorrow Conference in 1967 Alex Campbell remarked that whereas the citizens of the rich provinces were asking themselves whether they could afford colour television and a second car, his constituents were wondering

²⁷ Opening statement by the Honourable Daniel Johnson, Prime Minister of the Province of Quebec, Constitutional Conference, Ottawa, February 5, 1968.

whether they could afford to bring the plumbing indoors. It must be remembered that the Atlantic provinces have not undergone that economic rationalization and development of resources which we characterize by the term "modernization". This is partly due to their poverty; and it is partly due to the fact that, given that in Canada loyalties are regional (and nowhere more than in the Maritimes), they have not taken the obvious step of uniting and thus forming a common front which would have infinitely more strength than each has individually. It made some sense in 1867 that Prince Edward Island should be a province, although even then Maritime union was being discussed. It makes no sense today when its Premier speaks for a constituency no larger than the population of Kitchener, Ontario.

The Yukon and the Northwest Territories were not represented at the conference. This meant that the conference could not take cognizance of the problems of many Indian and all Eskimo Canadians. Nor could the conference discuss investments of foreign capital in the natural resources of the Northwest Territories. Strom was very much aware of this. He compared the development of Alaska with that of the Yukon and the Northwest Territories.

Alaska is being developed by a southern people — the Americans. It is appalling that we, a northern people, have not been able to match their efforts, at least in imagination and purpose, if not in magnitude.²⁸

²⁸ Opening statement by the Honourable Harry E. Strom, Premier of the Province of Alberta, Constitutional Conference, Ottawa, February 10, 1969.

... to many Western Canadians, northern development is not something which can be left to the future but something which is already upon us. If the integration of transportation networks, population movement, social services and educational opportunity in the Northwest is to be accomplished smoothly, northern development planning and action on the part of the Federal Government should be much further along than it is at present.

If we compare the development of Alaska in recent years with the development of the Yukon and the Northwest Territories, we are disappointed. The painfully slow and often tragic story of northern development in Canada is not the fault of the tiny bands of pioneers who now reside there. The basic fault must be borne by the Federal Government.

Alaska is being developed by a southern people — the Americans. It is appalling that we, a northern people, have not been able to match their efforts, at least in imagination and purpose, if not in magnitude.

The Federal Government of the United States granted Alaska her status as a state. The Federal Government of Canada has had the responsibility of managing our northern territories for as long a period, and yet to date the prospect of greater autonomy for the Yukon or the Northwest Territories is not even in sight, and the residents live under a suffocating Federal colonialism.

And so, we Western Canadians ask, what about northern development?

If the Federal Government does not intend to act, or cannot act, would the Government contemplate giving the Western Provinces an extension of their jurisdic-

He referred to the "suffocating Federal colonialism" under which the residents of the Yukon and the Northwest Territories live, and asked that if the federal government did not intend to act or could not act, would it give jurisdiction over these parts of Canada to the western provinces. Alaska had been made a state and was flourishing? Why should the Canadian north be left to the uninspired administration of eastern civil servants?²⁹

Strom's remarks made clear that the haphazard political geography of Canada must be changed. Subsequently, Bennett's plan for reorganization, although expressed with his customary hyperbole, was one of the few creative ideas to come out of the sessions. (I believe it has been endorsed by Prime Minister Robarts.) It had been stated earlier in the *Proposals of the Province of British Columbia on the Constitution of Canada, December, 1968*.

. . . I believe the time has come to recognize that in the interests of economic realities the boundaries of some of the Provinces will have to be altered and the separate existence of some other Provinces will have to be abolished so as to provide five viable and effective political units consonant and in conformity with the five economic regions of Canada. Imagine the increased efficiency and resultant substantial savings to the Canadian taxpayer that would result.

In keeping with the principle of political units conforming with the economic regions of Canada, British Columbia calls for the Federal Government to extend by legislation the boundaries of each of the applicable Provinces northward to the northern limits of continental Canada. Furthermore, the topographical characteristics support communication links and trade patterns running north and south rather than east and west.³⁰

Bennett's theories could be implemented in several ways. The Yukon and the Northwest Territories could be made provinces thus releasing them from the dead hand of bureaucratic administration. But they would be relatively powerless. Another possibility would be to sound out a prairie union among Alberta, Saskatchewan, and Manitoba, and add to such a union the Northwest Territories. This seems to be what Bennett had in mind when he spoke of "five viable and effective political units consonant and in conformity with the five economic regions of Canada". But such a prairie and northwest province would surely be too vast and would in many ways constitute a separate country unto itself. Moreover,

tion? Northern development is an aspiration of Western Canadians. Opportunities for its development must be provided.

²⁹ *Ibid.*

³⁰ *Proposals of the Province of British Columbia on the Constitution of Canada, December, 1968. Submitted by the Honourable W. A. C. Bennett, Premier and Minister of Finance of British Columbia.*

the regional loyalties of the prairie provinces would seem to be already so well established as to make this scheme dubious, if not unworkable.

The best plan perhaps would be to extend the boundaries of British Columbia to include the Yukon and the boundaries of Alberta, Saskatchewan, and Manitoba to the limits of continental Canada. The Atlantic provinces should form one political, and therefore one economic, unit. All of this cannot be done with a stroke of the pen. But then neither was the Confederation of 1867. There is nothing sacrosanct about the original boundaries, which have in fact been modified from time to time as need has required. On the contrary there is every reason to make them accord with the regional loyalties and economic interests that dominate Canadian political life. Our task is not to act upon the assumption of a national loyalty which exists only to a slight degree. Rather, it is to elicit clear articulation of the varying regional attitudes, which have been blurred over for so long. We want to find out why the regions feel as they do, rather than pretend that such feelings do not exist, or are of marginal importance, or are negative and uncreative. By rearranging our political boundaries along the lines I have suggested, or in some other logical fashion, by accepting the fact of regionalism as the basis for Canadian federation, we may be taking the first important step on the road to a new Constitution suited to the realities of our times. At the 1969 conference there was scarcely a word or a concept from any delegate to suggest that Canada was anything more than the sum of its parts. If its parts are redefined more realistically, we may well find that a concept of the meaning of the whole will emerge. Jean-Jacques Bertrand came closest to expressing this when he said in his opening statement:

. . . constitutional reform offers the only permanent solution for the deep crisis afflicting Canada. We need fresh agreement on basic issues; we must state very clearly the ground rules for relations between governments; we must reconsider the constitutional structure of our country, the form it is to take, the ends it is to pursue, so that our political institutions may not only meet the needs of the hour but those that will arise in days to come.³¹

Canada presents a problem and a case study of the greatest interest for the political scientist, because in Canada the centralizing trend of the modern state is reversed. Richard Goodwin, writing in January in *The New Yorker* on the present American discontents, singled out centralization and consequent big government as the most troubling development in our times for the average American citizen. It has made the citizen feel that he has no control over the forces that affect his life, that the casting

³¹ Opening statement by the Honourable Jean-Jacques Bertrand, Prime Minister of the Province of Quebec, Constitutional Conference, Ottawa, February 10, 1969.

of a ballot is meaningless because it could not in any event put an end to the bigness and the impersonality that overwhelm him.

Canada has been exempt from what appears elsewhere to be an irresistible trend. Two reasons for this exemption are clear enough. Education under the British North America Act is reserved to the provinces. This means that the provinces, not Ottawa, preside over the educational and technological revolution which may well be the most important phenomenon of our time. To put it another way, intellectual energy can be channelled towards decentralized rather than centralized power. The clearest example of this is to be found in the Province of Quebec, where provincial agencies have been established which require for their proper functioning almost the whole of Quebec's intellectual output. The same is true of Ontario, although since Ontario tends to think of itself as English-speaking Canada this is often overlooked or at least undefined. Until 1939 the federal civil services had a near monopoly of Canadian administrative talent. That monopoly does not exist today. Talent seeks the place where the power resides that can properly utilize and reward it.

The second reason for the trend towards decentralization in Canada is that, because of the accidents of history, Canada confronts international problems indirectly and at second hand. The Department of External Affairs will not bring to an end the war in Southeast Asia. It is unlikely that it will even contribute meaningfully to the termination of that war. Canada can do little to halt the arms race. We would be deluding ourselves were we to believe that we could effectively mediate between the U.S.S.R. and the United States or the U.S.S.R. and China. Canadian foreign policy, as I have already pointed out, is a policy of accommodation not a policy of initiatives. This being the case, there is no need for a centralized authority at Ottawa strong enough to confront the major powers of the world. Washington does that for us whether we like it or not, just as Whitehall did until 1939. Moreover, we do not have internal problems — such as race in the United States or in South Africa — of such seriousness and intensity as to require centralized authority for decision-making.

The fact of the matter is that there is a serious disparity between what Ottawa and the British North America Act say we are and what we really are. This is the clearest message to emerge from the conference. Canada is not a nation, but acts as though she were. As Alexander Brady has pointed out in *Democracy in the Dominions*, Canada is "an aggregation of sectional communities."³² An American political sociologist elaborated on this statement in 1963.

³² Alexander Brady, *Democracy in the Dominions*, University of Toronto Press, Toronto, 1947, p. 83.

Canada is not a nation in the full sense of a socially unified people possessing a consciousness of nationality and a sense of patriotism. Although the Canadian state has the instruments of national sovereignty, it has neither the embedded symbols of legitimacy nor the deep loyalties to the political community which Americans and Britishers take for granted. . . . Canada has remained in the British Commonwealth, and, while this pseudo-legitimacy has reinforced a sense of national unity, it has prevented the development of a truly national solidarity.³³

Now this may be all to the good. I am rather inclined to think that it is. We have seen to what extremes nineteenth-century nationalism can go. But our situation must be expressed positively, not simply felt negatively as was so apparent at the conference. What we need — and I think what the world needs now — is a political theory of regionalism. Then we must have a constitution based on that theory.

Canadians are a fortunate people. Our history and our geography have so far protected us against the dangers of twentieth-century super-government. We are unburdened by huge defence budgets and we have a minimum of international commitments. But this does not entitle us to play the role of Pangloss and say that all is well in this best of all possible worlds. Nor does it entitle us to play the role of the flower child of the western world, as the *Times Literary Supplement* accused us of doing several months ago. We have within our society the germ of a political theory that is more suited to the twentieth century than is the romanticism of Rousseau, the legalistic contract of Locke, the narrow pain-pleasure theories of the utilitarians, or the millennial expectations of Marxist thought. But if we are a fortunate people, in addition we are in some respects a very curious people. We recoil from any potentiality for greatness that we might possess. This perhaps is due to the fact that until 1939 we lived in the shadow of a British greatness, which we revered and had no desire to challenge, and now we live in the shadow of an American greatness, about which we feel many ambiguities. This uncertainty about ourselves is evident in the unconsciously self-deprecatory tone of our newspaper columnists, so apparent to the Canadian who has lived abroad for some years. It is apparent in the massive insecurity exhibited at the recent Montreal symposium devoted to the emigration to Canada of foreign intellectuals. (Apparently it occurred to none of the participants in the symposium that foreign intellectuals might want to come to Canada because our country has perhaps the freest political order and potentially one of the most humanly rewarding social orders in the world

³³ Robert R. Alford, *Party and Society*, Rand McNally & Company, Chicago, 1963, pp. 254-255.

today.) It is this hesitation to recognize what we have achieved and to institutionalize that achievement that we must overcome.

More than that, we have a political and social responsibility to our own people. We are presented with moral problems not envisioned in 1867 and therefore not provided for by the British North America Act. If there is any meaning to Canadian citizenship, by what right are the residents of British Columbia infinitely richer and exposed to infinitely greater economic opportunities than the residents of Newfoundland and Prince Edward Island? Newfoundland was not, of course, part of Canada until 1949, and in 1867 the economic disparities between Canada West and the Atlantic provinces were not particularly striking. British Columbia and the prairie provinces did not exist. What we have to do is devise a federal structure in which there is some real sense of participation on the part of all regions in disposing of that economic power which is chiefly concentrated in two or three of them. At the same time we must avoid the harmful centralizing tendencies of the modern, rational, bureaucratic state. To achieve this we must not oppose a Quebec against a vague Canadianism which the rest of us are assumed with little justification to share. We must accept our regionalisms (of which Quebec is only one) as a product of history, and we must seek to understand them. They should be the basis for that division of sovereignty which is the essence of a federal union. However, we cannot arrive at a division of powers which will function if we do not take into account the fact that the various regionalisms are based on different historical experiences, in many cases on different and complex traditions. This is why a purely rational formula for revenue equalizations in any particular year will not endure for long and cannot be the basis of a new and lasting union. If Canada has any distinctive role in the world, and therefore any reason for existing beyond the enjoyment of material affluence, it is to discover and articulate the political philosophy which will bring about that union. The task is urgent. The 1969 conference showed little more than signs of gradual deterioration and disintegration. Time is running out.

The Nature of a Bicultural Constitutionalism¹

Edward McWhinney

When the members of the Royal Commission on Bilingualism and Biculturalism held their public hearings in Toronto in 1965, they raised a question that they seemed to reserve with particular pleasure for the legally trained petitioners presenting oral briefs before them: "Do your proposals apply equally to section 133 of the Constitution?" I suspect that the question was intended by the Commissioners as a simple exercise in political gamesmanship to faze their Anglophonic petitioners; for I cannot believe that they really expected anyone to be particularly interested in changing section 133. And if gamesmanship was the motive, the effects were clear: the legally trained Anglophonic petitioners, on the whole, had absolutely no idea what section 133 was all about — any more indeed than senior seminar students in law schools in the English-speaking provinces, as I discovered when I later posed the same question to them simply to see what the result would be.

The point is, of course, that Canadian constitutional law, for the English-speaking lawyer and law student, to date has tended to be limited to the logical exegesis of *two* sections only of the B.N.A. Act, sections 91 and 92. Law courses in the English-speaking provinces have not given attention to the shift in the locus of community decision-making, from the old-fashioned triad of authority — executive, legislature, and judiciary (at both federal and provincial levels) — to totally new institutions, such as the dominion-provincial conference. Instead, their constitutional law approach remains essentially judge-oriented, and final appellate judge-oriented at that; and the legal source materials used are invariably

¹ Based on the text of an address to a joint meeting of the Canadian Association of Comparative Law and the Association of Canadian Law Teachers, held in Ottawa on June 8, 1967, as part of the Canadian Centennial Celebrations, 1967.

the products of judicial opinion-writing at the Supreme Court level, usually predigested or rendered more succinct and coherent by the case-book editor's scissors-and-paste refinements.

The limits of legal (meaning here, especially, judicial) logic and the gap between the law-in-books (or constitution as written in the original text) and the law-in-action (or constitution as actually interpreted and applied, in frequently conflicting ways, by the judges) are usually amply demonstrated today. But by and large, Canadian constitutional law, as taught in the English-speaking provinces, takes for granted a pre-existing constitutional order with a relatively stable, if not exactly static, pattern of institutional relationships between the different ethnic-cultural groups making up the society that the constitutional order is supposed to reflect. Otherwise the scientific legal emphasis upon the judicial process — specifically, upon the judicial process as developed in the section 91/section 92, B.N.A. Act dichotomy — becomes largely meaningless. I do not believe, however, that it can continue very much longer to be a viable political or intellectual legal approach in this society, where the very foundations of the constitutional order are under continuing re-examination and questioning as the fabric of constitutional society itself sometimes threatens to tear apart under the impact of biculturalism.

I taught as a visiting professor in the *Faculté de droit* at Laval University in the spring semester of 1967. And I was intrigued to find how radically different the conception and scope of the public law and constitutional law courses are between French-speaking and English-speaking law schools. Faculty calendars, of course, can be misleading; for sometimes their terse, capsuled outlines are drafted more for posterity or for public relations than really to inform the as yet legally uninitiated. Nevertheless, it is very interesting that the first year course in public law in the *Faculté de droit* at Laval University concerned itself at that time principally with such questions as "The forms of the State from the viewpoint of organisation of personal competence (Unitary State; federation of States; confederation of States), and the incidence of the organisation of parties on them"; "The forms of the State from the viewpoint of organisation of material competence (the régime of separation of powers and of confusion of powers)"; "The forms of the State according to the Rôle of the State in the collectivity (Negative State, Positive State; Watchman's State, Welfare State)". The follow-up third year course in constitutional law was heavily comparative, including comparisons through both space and time (pre-Confederation of 1867 constitutions), and gave secondary attention to federal and provincial judicial power.

There may be arguments, of course, as to which approach — that of the English-speaking Common Law law schools or that of the French-

speaking Civil Law law schools — produces the more technically competent lawyer; but there can be no doubt as to which intellectual approach is best designed to equip the lawyer, as citizen, to grapple with the as yet only partly discerned and partly answered political-constitutional problems of this revolutionary age. Undoubtedly the social forces that produced the contemporary Quiet Revolution in Quebec would have worked themselves out, institutionally, whatever might have been taught in the law schools. But the Quebec law schools at least seem to have equipped their graduates to face the unknown with some modest confidence, by exposing to them some of the range of the constitutional options and alternatives in any remaking of our constitutional order, and by trying to make them see this present order more clearly in the context of our society and its history.

The constitutional lawyer who moves, as I do, from constitutional law into the domain of international law and legal theory is often struck by the similarities between one branch of law and another. Much in the present constitutional “great debate” in Canada is reminiscent of the Soviet-Western “Coexistence” dialogue, which used to exercise jurists in the two great competing power blocs of the world community in the era following political de-Stalinization in the Soviet Union and preceding the political effectuation of the current Soviet-Western *détente*. The principal intellectual issue then was the extent to which a general or comprehensive international law could operate effectively, granted the existence of the two great competing political-military blocs, Soviet and Western, each with its own separate ideology and value system. Yet the answer, in the international arena, has been clear. It is not necessary to have total community acceptance of all the rules in a postulated universal system for a viable system of world public order to exist; nor is it even necessary that those rules that are, in general, accepted should be accepted one hundred per cent or that they should be accepted all of the time. It is enough to have a certain minimum number of ground rules that are generally accepted, because they rest on genuine mutuality and reciprocity of interest between the competing ideological systems; and it is enough also to have a certain consensus as to the permissible and impermissible modes of changing those ground rules or of creating new ones for the future. The developing rules of Soviet-Western interbloc law — the original Cold War “rules of the game”, or the “Law of Peaceful Coexistence” as Soviet jurists preferred to style them — derived strength from the analogous development of municipal law in municipal society. At earlier troubled periods in world historical development, such as the Renaissance and the Reformation, a viable minimum political-governmental order could and did exist, even though the societies concerned might be

rent by religious or racial conflict and the king's writ might not always run beyond the reach of the king's armies. Similarly the analogy of coexistence in the contemporary international arena can be applied to Canada's current experience, when the key concepts of the constitutional order of 1867 are regarded no longer as necessarily sacrosanct but as subject, like any other economic or social institution, to the rule of reason and the pragmatic test of whether they work. They must satisfy contemporary needs and the aspirations of all main participants in the political community.

The current Canadian constitutional dialogue has tended in the immediate past to polarize around French Canada's aspirations — in simplistic terms, "What does Quebec want?" — primarily because, of course, it is French Canada that is supposed to be interested in challenging or changing the status quo. But not all of Quebec's aspirations are strictly "bicultural" in character, having to do with a "redressing" in some form or other of a supposed constitutional imbalance of French-Canadian interests in relation to those of English Canada. Some part of the dynamic of the Quiet Revolution is clearly directed to political-institutional reform, *per se*, unrelated to bicultural issues. For example, the proponents of various schemes to introduce a "presidential" system in the Province of Quebec seem far less interested in abolishing old-fashioned royalist symbols supposedly represented by parliamentary government, than in enlisting some of the institutional advantages of strong executive government on the American (or, more persuasively perhaps in a Quebec context, French) model, as represented by a classic separation of powers and a cabinet of ministers detached from day-by-day legislative responsibilities and so free to give their main energies to political administration and policy-making.

The project for a provincial constitution for Quebec, which some in English-speaking Canada have taken as a sign of Quebec's breakaway, separatist tendencies, is also (if not indeed principally) a response to Jeremy Bentham's principle of making the law "cognoscible"; similar action has been taken already by the member-states of the Australian federation in consolidating or reducing their constitutional acts and statutes, as far as possible, to a single charter. Beyond that, to the extent that the Quebec provincial constitutional project would also involve, incidentally, an entrenched provincial Bill of Rights, embracing *inter alia* all the classical libertarian, speech, and communication rights, it would seek to introduce a new element of constitutionally concretized liberal activism that seems to go significantly beyond parallel achievements or proposals in the other (English-speaking) provinces to date.

The advantage of a revolution — of a Quiet Revolution, anyway — is

that it permits a comprehensive, new look at old institutions to see how they have stood the test of time. It would be a pity if the sum of constitutional thinking in the English-speaking provinces should be a mere negative response to Quebec's affirmative proposals for change. When Attorney General Arthur Wishart of Ontario declared² that the central government was the creation of the provinces, he stated no more, nor less, than the historical truth of 1867. He subsequently proposed that the present federal constitution should be modified so as to take better account of the vastly increased governmental responsibilities of the provincial governments. The alarmed or mildly outraged response, in some English-speaking quarters, to this suggestion demonstrates the essential sterility of much of contemporary constitutional thinking. More important, it indicates also that many lawyers in English-speaking Canada have forgotten the basic pragmatic credo of Common Law legal philosophy, that old institutions and rules must be tested experientially to see how well they respond to the social problems for which they were created in the first place, and that they must be revised if they prove to be deficient in the present context.

The argument for achieving biculturalism constitutionally has not yet been refined, in Quebec, to the point where there is any single generally agreed upon or generally approved constitutional blueprint or action program. Various proposals have been made at various times for reconstituting the Senate as a provincial rights house, with parity of voting powers between Quebec and the English-speaking provinces. Other proposals recommend the reorganization of the Supreme Court of Canada; the principal suggestions are the creation of a specialist chamber composed solely of Civil Law judges to hear appeals arising under the Quebec Civil Code; and the creation of a federal constitutional court, as an expert or specialist final appellate tribunal, comparable to the West German *Bundesverfassungsgericht*, having exclusive jurisdiction in dominion-provincial constitutional conflicts.

The issue of constitutional review in a federal state is a complex one, and a judicially based system of constitutional review is not the only, or even necessarily the best, mode of institutionally moderating executive-legislative power, or of arbitrating jurisdictional conflicts and differences between federal and provincial authorities. A reformed Senate that could be transformed from its present status of a constitutional cipher into a genuine provincial rights' house could assume many of the constitutional checks-and-balances functions exercised, for example, in the United States by the United States Supreme Court. Again, Canada's present dominion-

² Debate in the Ontario Legislature on Premier John Robarts' proposal for a Confederation of Tomorrow conference, May 1967.

provincial conference system seems responsible, much more now than the Supreme Court, for the many and far-reaching informal constitutional changes that have occurred since World War II. There is a case for formalizing this process of more or less consensual constitutional adjustment between the dominion and the provinces, and for more substantially institutionalizing it. It would mean, of course, following the Constitution as it actually works (as "law-in-action", in Legal Realist terminology) and accordingly giving it a new institutional shape. It might also mean removing some of the currently almost unbearable political and psychological pressures from the Supreme Court; for, presently constituted as a mixed, "all purpose" court, the Supreme Court runs the risk of having to do too many different things at once and so perhaps of doing none particularly satisfactorily.

The dynamic of constitutional change which these various institutional proposals represent is the notion that Quebec is separate and distinct from the other (English-speaking) provinces, and that its unique characteristics create special needs warranting special constitutional treatment. In an extreme form, this is the path to constitutional secession or separatism; or (less than that) to an "associate state" status, linking Quebec and the rest of Canada in some sort of loose way vaguely reminiscent of that other great (and wholly Civil Law) constitutionally pluralist experiment of 1867, the Austro-Hungarian *Ausgleich* or Dual Monarchy. In a more modest form, perhaps a separate and distinct status for Quebec already exists in Canada under present constitutional arrangements, with the special guarantees as to language rights, the protection for the Quebec Civil Code, and the like. I take it that national political parties like the New Democratic Party which, predominantly English-speaking as they are, argue for English-speaking acceptance and recognition of a "*special constitutional status*" — or (to use former Quebec Liberal Premier Jean Lesage's own term) a "*particular constitutional status*" — would aim to build on and to extend these existing constitutional arrangements recognizing Quebec's special interests and claims.

A new element in the constitutional dialogue is the suggestion, attributed, among others, to Pierre Elliott Trudeau when he was federal Minister of Justice, that the way to head off Quebec's special claims and to preserve Confederation is to insist that all the provinces be treated as equal to one another; but that the existing balance of dominion-provincial powers be tipped henceforward in favour of the provinces, to produce a much more substantially decentralized federalism in Canada than now exists. Nevertheless, several aspects of this particular argument are not clear, and do not seem to have been fully thought out in all their implications. It is one thing to deny a "particular constitutional status"

for Quebec; but is it realistic to insist that all of the provinces are, and should be, as a matter of "law-in-action", equal? Is Prince Edward Island really *equal*, say, to Quebec or to Ontario? It might be wiser to take note more affirmatively of the special responsibilities of the larger industrial provinces, and correlatively of the special needs (by way of special equalization payments, for example) of the smaller, essentially non-industrialized, and economically backward provinces.

Again, this argument for "ten equal provinces in a new, greatly decentralized federal system" purports to rest on an "original", or "true" meaning, of the B.N.A. Act — interpreting it according to its text. This, I suggest, is a greatly oversimplified picture of the process of judicial review of the Canadian Constitution, both as a logical exercise in itself and also as a matter of the actual history of the changing, and frequently directly conflicting, majority judicial interpretations of the B.N.A. Act in the century since 1867. It would do less violence to the changing historical facts of Canadian federalism and to the corresponding changing balance of dominion-provincial governmental powers, *inter se*, if this approach could be based on pragmatic arguments relating to the vastly increased societal acceptance, as desirable and necessary community goals, of expanded governmental services in health, social services, and education — all matters, of course, within provincial legislative jurisdiction in terms of the B.N.A. Act as historically intended and actually written. The constitutional follow-up to all this, of course, is the next, and, as it seems, logically unavoidable, step of supporting a reallocation of taxation and revenue powers between the dominion and the provinces, to allow the provinces greatly increased financial resources, commensurate in measure to their vastly increased political responsibilities in response to new community expectations and pressures for governmental action and intervention.

Having uttered these mild strictures on Mr. Trudeau's and others' erstwhile thesis for Canadian federalism for the future, let me say that it does seem to come close to reflecting the political facts of life in Canada today, represented by the two conflicting currents in Canadian constitutionalism: a centripetal trend, whereby the main decision-making power relating to defence and foreign policy is increasingly influenced or even is actually exercised on a continent-wide "North American" basis, and fiscal policy is determined by essentially continental North American forces; and a centrifugal trend, whereby, in compensation, policy-making in social and cultural matters is consciously devolved to the local level. This is a species of new, *pluralistic* federalism, that seems now to be emerging as the dominant characteristic of Canadian constitutional "law-in-action". Its viability as a political fact rests finally on Quebec's opting

for a future as an expanding industrial society, and at the same time opting for the accelerating rate of economic growth and social development that comes from the abandonment of the symbols and claims of autarchic nationalism in favour of the tangible benefits flowing from more comprehensive regional development as part of a larger, Canadian, and ultimately perhaps continental, political-economic community. The merit of pluralistic federalism, in its new form, is that the new sophistication regarding techniques for policy-determination in social matters at the local level allows for a practical reconciliation of the best goals of the Quiet Revolution with the economic imperatives of today that call for ever larger planning units.

Of course, a certain degree of mutual self-restraint will have to be exercised by both dominion and provinces, if these developments are to succeed. I find it strange in this regard that, after all the elaborate stage play of the dominion-sponsored and dominion-created constitutional-international precedent of an "umbrella agreement" for purposes of the Canada-France cultural accord, the dominion summarily, and without so much as a by-your-leave or consultation with the provinces, ignored the "umbrella agreement" procedure and signed a direct Canada-Belgium cultural accord that covered, among other things, mutual recognition of university degrees and exchanges of scholars, that were clearly *ultra vires* of the dominion and within provincial legislative powers under the B.N.A. Act. I have never considered that the cultural accord, as such, comes within the area of the foreign affairs power, except in a purely honorific way. In fact the English-speaking provinces — and I am thinking here especially of Ontario — have made such agreements freely with other countries, but without any pomp and ceremony, usually having them signed by their civil servants on behalf of the government. It has been snidely suggested in Quebec that the "dispute" between Quebec and Ottawa over cultural accords and the foreign affairs power was a purely collusive or "phoney war"; it was designed as a Quebec pre-election stunt between two friendly governments to demonstrate, for the record, that Mr. Lesage's provincial government was not afraid to tweak Ottawa's nose for nationalist reasons. In this case, the "umbrella agreement" procedure, approved by Quebec and Ottawa, would be constitutionally superfluous, redundant, and unnecessary — a "phoney accord" to end a "phoney war".

Nevertheless, all this having been said, I will suggest that having created its own special brainchild, the "umbrella agreement", it was both bad federalism and also bad manners for the dominion to abandon that procedure so suddenly, without any prior consultation with the provinces. It is difficult to avoid the conclusion either that someone in Ottawa

intended a quite gratuitous slap in the face for Premier Daniel Johnson of Quebec over the Belgian cultural accord — after all, Daniel Johnson was not, in Ottawa eyes, Jean Lesage — or that someone in Ottawa acted in a deplorably gauche or negligent way. The subsequent public bad behaviour of Quebec officials (though not, be it noted, of Premier Daniel Johnson) in the Belgian matter simply confirmed the need for prudence and self-restraint on both sides, dominion and provincial, in the present era of crisis. As a matter of constitutional law, the principle of federal comity, as interpreted, applied, and enforced by federal constitutional courts in other countries, would require no less, on the part of both dominion and provincial governments equally. Presumably this principle would require the dominion to respect provincial policies in concluding treaties within areas of provincial competence under the B.N.A. Act; and it would certainly require provincial forbearance in approaching the matter of cultural or commercial contacts in sensitive areas of Canadian foreign policy — for example, contacts with countries not yet diplomatically recognized by Canada, such as Communist China. Beyond these obvious situations, the principle of federal comity, as a constitutional law requirement in a federal state, rests on commonsense and mutual give-and-take, and ultimately, on reasonableness.

Meanwhile, we move on to the attempt to arrive at a new constitutional consensus in Canada. Ontario's Confederation of Tomorrow Conference, initiated by Premier John Robarts, was an attempt to rationalize and synthesize all the piecemeal, casual, and often not very well-planned or conceived, changes and glosses on our federal constitutional order that have been established in the informal give-and-take of dominion-provincial conferences over the last decade. There are times, of course, when it is best to concentrate only on problem-solving *ad hoc*; and other times when it is helpful to try to determine the general trends and drifts of societal events and the movement of world history generally. Consideration of ultimate goals thus helps to clarify and render more scientific the choice of means and techniques for solving particular problems as they arise. The pragmatic, empirically based, problem-oriented, step-by-step approach, so useful at the international level in resolving concrete problems of Soviet-Western conflict in the Cold War era, has its application and relevance also in the present Canadian context of bicultural federalism. By concentrating, as Premier Robarts suggested, on the tension-issues — that is to say, the three or four main areas of dominion-provincial interaction or conflict — and on the actual problems that have arisen thereunder and their concrete solutions, the Confederation of Tomorrow Conference helped to start the movement to a new national constitutional consensus that would be firmly rooted in both

main cultural systems. Once that should be attained, the business of institutionalizing the new consensus in new political-constitutional forms will tend to reveal itself as essentially far less complex and difficult than it now seems, when the debate is being conducted only at an *a priori* level of abstract political ideology or largely rhetorical claims and counter-claims.

Our Present Discontents¹

Eugene Forsey

"Our Present Discontents" is a title wide enough to cover almost anything, or at least anything disagreeable. But . . . I shall confine myself to the discontents many people now feel with our Constitution. I shall not give . . . a detailed list of them . . ., nor offer . . . specific amendments to remedy them, still less even an outline of a new Constitution. These will be the tasks of [a series of] . . . Conferences of Governments. What I shall attempt here is something more modest; first, a statement of the main discontents as I see them; second, certain basic principles we must follow, if the Conferences are not to end in chaos and old night; third, some things we can do, in the light of those facts and those principles.

The main discontents may be summed up under three heads.

First, all the provinces want more money, and at least the larger ones would like to get more of it by a re-division of taxing powers. At present, the Dominion's taxing power is unlimited while the provinces can impose only direct taxes for provincial purposes. True, the Courts have widened this by declaring that provincial sales taxes are "direct" (which, to the plain man, recalls Mr. Bumble). But even so, with the Dominion pre-empting most of the income tax, the provinces' resources are plainly inadequate. The responsibilities assigned to them by the British North America Act, notably roads and education, are far more expensive than anyone could have dreamed a century ago; and the Judicial Committee of the British Privy Council, by its interpretation of the Act, has conferred, or imposed, on them further responsibilities, notably most of social security, which are also enormously expensive.

¹ The texts of the George Nowlan Lectures delivered at Acadia University, Wolfville, N.S. on Thursday and Friday evenings, October 19 and 20, 1967. Reprinted by permission of Acadia University.

There are two ways of meeting this difficulty without changing the Constitution. One is conditional Dominion grants, in aid of approved provincial expenditures, the so-called "joint programmes." The other is unconditional Dominion grants: the traditional subsidies, and the equalization payments. One is grants with strings; the other grants without strings.

The grants with strings are now on the way out. Quebec wants to get rid of nearly all of them, and resume the full management of what might be called her own constitutional property. Several, if not most, of the other provinces dislike the pressure to accept the Dominion's scale of priorities which grants-in-aid involve. And the Dominion itself is anxious to get out of the whole thing as fast and as far as it can.

Every province seems willing to accept the unconditional grants. Quebec would like to see them replaced in large part, and soon, by a massive transfer of taxing power from the Dominion to that province. Most, or all, of the other provinces apparently regard them as a permanent feature of Canadian federalism. But at least the larger and richer of the other nine provinces would probably also like to see a considerable transfer of taxing power from the Dominion to themselves. The smaller and poorer ones are, I think, less insistent on this: they have so much less to tax.

The second main constitutional discontent is the discontent of French Canada with its constitutional position. Note that I say "French Canada," not "the province of Quebec." "French Canada" and "Quebec" are not synonymous. There are upwards of a million French-speaking Canadians outside Quebec; and the constitutional position of even the French-speaking Canadians inside Quebec is not the same thing as the constitutional position of that province. What is at issue here has, in fact, nothing to do, directly, with the constitutional position of Quebec; indeed, more power for Quebec could very well mean less for French Canada. We shall come to Quebec presently; for the moment, I am concerned with the very different question of the rights of French-speaking Canadians in the other nine provinces, and with the share of French-speaking Canadians in running the whole country. On both counts, French-speaking Canadians are dissatisfied with our existing arrangements; on both, they want changes, whether in the written Constitution, or in the way it is worked, or in both.

The third main . . . discontent is . . . [that] of Quebec, or at least . . . its Government, its official Opposition, and a highly vocal section of its people, with the constitutional position and powers of the province. Some of them want complete independence. Some want "political sovereignty" for Quebec with a "common market" or "economic integration" or some

joint services with the rest of Canada. Some want two "Associate States," Quebec and Canada, each "independent," but with some joint organs: a sort of twentieth-century North American Austria-Hungary. Most profess to want a "special status" within Confederation, with a more or less — usually more — massive transfer of power, in Quebec, from the Government and Parliament of Canada to the Government and Legislature of Quebec. Scarcely any voice in Quebec seems satisfied with the *status quo*.

Of the three constitutional discontents, the last is much the most dangerous to the continued existence of this country, and to the welfare of its people, French-speaking as well as English-speaking; and very dangerous it is. It is possible that satisfactory remedies to the other two discontents might blunt the thrust of Quebec nationalism, and that is an additional reason why we need to consider them very seriously. It is also possible that Quebec nationalism will be indifferent to any remedies for the first two discontents and satisfied with nothing less than the destruction of Canada, either at one fell swoop or by instalments.

Now for those "basic facts and principles."

The first basic fact we must get clear is that our existing Constitution is not a piece of old furniture, or an old top hat, or a Victorian system of plumbing. It is something which grew out of the needs of the pre-Confederation colonies, which gave us life as a people, which has shaped our life as a people, which has adapted itself to our changing needs as a people. It has not remained what it was in 1867. It has grown, in some respects almost out of all recognition: a little by formal amendment; much by judicial interpretation; most of all, perhaps, by the development of new habits, new customs, new "conventions," new administrative arrangements, especially inter-governmental arrangements. Perhaps it now needs further formal amendment. But let us never forget that, because a Constitution is what it is, pervading and shaping the lives of every human being in the community, changing it by formal amendment is an immensely serious business. It is not like getting a new hair-do, or growing a beard, or buying new furniture or new clothes, or putting in a new bathroom. It is more like marriage: "not by any to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly, . . . but reverently, discreetly, advisedly, soberly, and in the fear of God." What we are dealing with in constitutional change is not paper or things. It is human lives.

A second basic necessity for wise constitutional change is to get our history straight. We are sometimes told now that history doesn't matter. To those who say this, my reply must be a Johnsonian: "This is cant. My dear friends, clear your minds of cant."

Canada is not just a piece of real estate. It is a human community,

rooted in time as well as space. We cannot disregard our history. If we try, the most we shall succeed in doing is to get rid of real history and leave our heads swept and garnished for the seven devils of pseudo-history.

Here they are:

1) *The British North America Act was designed by British overlords; from which it follows, of course, that we must now scrap it and give ourselves a home-made one.*

Rubbish. The Act is nearly one hundred per cent home-made. It was designed by Conferences in Charlottetown, Quebec and London made up wholly of British North Americans. Not one representative of the British Government was even present. The Colonial Office was uneasy about the absence of any provision for overcoming a deadlock between the Senate and the Commons; and the Foreign Office was alarmed lest the Americans take umbrage at our delegates' proposal to call the new nation "the Kingdom of Canada." But, even on these points, though our delegates had to give ground, they insisted on drafting their own provision for swamping the Senate, and produced their own substitute for "Kingdom": "Dominion."

2) *The monarchy was imposed on us, or, at best, we accepted it grudgingly, absent-mindedly, or because we dassn't do anything else.*

Fudge. Sir John A. Macdonald took great pains to emphasize that the delegates had been perfectly free to cut loose from Britain, and therefore, of course, from the monarchy, completely, but that not one had so much as suggested it; Sir George Cartier's speech in the *Confederation Debates* is full of ardent monarchism; and, when the Fathers were forced to give up the title "Kingdom," they substituted "Dominion," explicitly, as Lord Carnarvon told the Queen, "as a tribute to the Monarchical principle which they earnestly desire to uphold." The monarchy, then, is our own. We chose it ourselves, unanimously, deliberately, and with our eyes wide open. It was not imposed on Canada by Britain, nor on French-Canadians by English-Canadians, nor on anyone by anyone.

3) *The British North America Act is a Constitution for a "horse-and-buggy" age.*

This looks obviously true (though it would be more accurate to say a "railway age"). In fact, it is glaringly untrue. The Fathers, recoiling from the horrors of "States' rights," deliberately framed our Constitution so that every power not distinctly and exclusively conferred on the provinces would belong automatically to the Dominion. So everything not mentioned *must* fall to the Dominion, unless it was unmistakably a

merely local and private matter in a single province. And the Fathers themselves, in the new Dominion Parliament, drew exactly this conclusion. Trade unions were not mentioned; and the Dominion Parliament, in 1872, passed a Trade Unions Act. Factory legislation was not mentioned; and in the early 1880's Sir John A. Macdonald's Government placed three successive Factory Bills before the Dominion Parliament.

Trade unions and factory bills were not new, just unmentioned. . . . *A fortiori*, anything unforeseen, being of necessity unmentioned, must also fall within Dominion jurisdiction, again unless . . . unmistakably a merely local or private matter in a single province.

The Judicial Committee of the Privy Council, the Stepfathers of Confederation, turned a good deal of the Fathers' work upside down, and, in effect, handed most of labour legislation and social security, and much of the regulation of trade and commerce to the provinces. But even after the havoc they wrought, a good deal of the original division of powers still remains. And a good many new things — interprovincial and international highway motor traffic, interprovincial and international telephone lines, radio, television, air transport — have in fact gone to the Dominion. Even the not-so-new grain trade, which a court decision fatuously assigned to the provinces, was rescued by means of the Fathers' far-sighted provision in section 92, head 10, paragraph (c) of the B.N.A. Act, by which the Dominion Parliament can assert exclusive jurisdiction over any local "work" simply by declaring it to be "for the general advantage of Canada or of two or more of the provinces."

The Fathers, in fact, gave us a Constitution marvellously, almost incredibly, well fitted to meet the needs of a technologically advancing society. It is the Stepfathers who imposed on the provinces burdens grievous to be borne, to which the fiscal resources provided for their original, very limited, responsibilities, are, inevitably, woefully inadequate.

Ironically, it is usually the very people who say that our present Constitution is unfitted for the age of the jet and the sputnik, who urge us to adopt a more decentralized one: to go back, constitutionally, to the age of the ox-cart.

4) *Confederation was a "pact," "agreed in Charlottetown and finally in Quebec" between representatives of "two founding peoples," English Canada and "French Canada"; "two groups . . . relatively evenly balanced"; "Quebec, the former Lower Canada, [which] grouped the people of French origin," and "the other three provinces, or the other two plus Upper Canada, [which] grouped those who had English as their common language and similar cultural traditions."* (I am quoting a former Minister of Justice.) In other words, the Charlottetown and Quebec Conferences and the London Conference after them, were, in effect, bilateral negotia-

tions between these two, approximately equally numerous, linguistic groups.

This is a fairy-tale.

In the first place, the "two groups" were not "relatively evenly balanced". Canada East, the future Quebec, had little more than half as many people as Canada West, Nova Scotia, and New Brunswick combined, let alone Canada West plus all four Atlantic colonies; and about 24 per cent of the population of Canada East itself was English-speaking. For the whole four provinces of the original Dominion together, the proportion of English-speaking to French-speaking was about two to one.

In the second place, I cannot find the slightest evidence that at Charlottetown, Quebec, or London the delegates lined up on linguistic lines. If they had, the French-speaking would have been hopelessly outnumbered. At Charlottetown, there were two French-speaking delegates out of 22; at Quebec, four out of 33; at London, two out of sixteen. There seems to have been little, if any, discussion of bilingualism, and the arguments over other matters seem to have been rather between the "Canadians" as a whole and some of the Maritimers, than between "English" and "French."

I cannot resist the conclusion that most of those who talk about the "pact" between two "equal founding peoples" are unconsciously equating Canada East with French Canada, and the *pre*-Confederation Province of Canada with the *post*-Confederation Dominion of Canada. Canada East *was* "relatively evenly balanced" with Canada West: their 1861 populations were about 44 to 56. But almost 24 per cent of Canada East was English-speaking, and the Dominion of Canada, even in 1867, was not a mere continuance of the old Province of Canada, nor the old Province writ large.

Only on the basis of the double confusion does the "pact" between an approximately equal "English Canada" and "French Canada" make any kind of sense. Grant the unfounded assumption, ignore the proportions of membership in the Conferences, disregard the evidence of what was said and who said it, and the British North America Act becomes simply a cosy arrangement between the French-speaking delegates from Canada East on the one hand, and the English-speaking delegates from the two Canadas on the other, with the delegates from the Maritime (or Atlantic) provinces merely sitting on the sidelines, smiling sweetly, murmuring occasionally "and of course the Intercolonial Railway," and then signing on the dotted line what the "Canadians" had already settled.

But the fact is that both at Quebec and London, the Maritime delegates were very far from being yesmen or noddors. On both occasions they had a great deal to say, and said it, fortissimo and at length. The

admittedly incomplete records, indeed, show that they took up considerably more time than most of the "Canadians," and far more than the French-Canadians, and by no means all on specifically Maritime interests.

In short, there is not, as far as I can discover, the faintest evidence of any "pact," agreement or bargain, in the Charlottetown, Quebec, and London Conferences or out of them, between two linguistic blocs. Anything of this sort that took place must have taken place within the Cabinet of the Province of Canada before its delegates ever left for Charlottetown. The Maritime provinces, and, later, Newfoundland, seem (and very naturally) to have accepted without question, and apparently without discussion, the arrangements the "Canadians" had arrived at about their purely local affairs: if they wanted the future Quebec to be officially bilingual and the future Ontario unilingual, that was their business, and no skin off any Maritime nose. The Maritime delegates seem also to have accepted without question, and without discussion, the justice, the practical necessity, the inevitability, of the French-Canadians having the right to speak their own language in the Dominion Parliament and in any Courts it might create, and to have the Acts and records of Parliament, and certain documents of Dominion Courts in French as well as English. The influential Hon. Joseph Cauchon, a convert to Confederation, in a contemporary booklet on the subject, devoted exactly two of his 154 pages to the language question; and the burden of what he said was, first, "How fortunate we are, compared with our poor brethren in Louisiana!" and, second, "How splendid it is that we did not even have to ask for our rights: our English-speaking fellow-citizens are so enlightened and broadminded that they never even raised a question on the subject!"

5) *Canada was intended to be, in some sense, "two nations"*.

It was certainly not intended to be two political nations, or anything like two political nations. That is unmistakably plain. The Province of Canada had had something approximating two political nations, in constitutional practice, though not in law, under the Union of 1840-1867; and it had broken down so completely that the "Canadians," in the 1864 sense of the word, came all the way to Charlottetown to ask the Maritime provinces to help them out of the mess they'd got themselves into. And over and over again, one after another, in Charlottetown, in Halifax, in Saint John, in Quebec, in Montreal, the "Canadian" Fathers of Confederation, French, English, Irish, Scotch, declared emphatically, and in both languages, that they were creating "a new nation," "a new and great nation," "une nouvelle nation," "une seule et grande nation;" or in Sir George Cartier's phrase, "a new political nationality." The French-Canadians got, certainly, guarantees for the survival of their own

culture, their own "nationality," as, along with the English, the Scotch, and the Irish (the last, incidentally, far more numerous than the other two), it was then generally called. But that it was to be survival within the framework of the single new political nation, no one seriously questioned.

6) *It was agreed, in 1867 [to quote again the former Minister of Justice] that French "was to be recognized and applied in all federal fields on the same footing as" English; and "Quebec believes that the contractual provisions . . . that guarantee French as one of Canada's two official languages for affairs of state, for a federal Parliament, and for the federal courts . . . have been allowed to lapse."*

This is perhaps the wildest piece of pseudo-history in the whole lot.

An agreement that French was to be recognized and applied on the same footing as English in all federal fields would cover, presumably, money, stamps, cheques, and the writing of Orders and Minutes of Council in both languages. Is there one syllable about any of these things in the B.N.A. Act? There is not. Is there one line of evidence, one sentence in a speech or letter, to show that anything of the sort was ever promised? If there is, I have never heard of it, and I have repeatedly challenged anyone to produce it, but in vain. Were the questions of bilingual money, bilingual stamps, or bilingual cheques ever even raised till long after Confederation? Not that I have been able to discover. Were there any bilingual Orders or Minutes of Council in the early years after Confederation? [No. But] . . . in the thousands passed between July 1, 1867 and May 19, 1882, . . . [there was one in French]: P.C. 753 of May 19, 1881.

If the agreement about the use of French was really as comprehensive as the ex-Minister suggested, it is odd that Cartier, Langevin, and Chapais, all Fathers of Confederation and all members of the first Dominion Cabinet, should have tamely submitted to such flagrant breaches of it. It is scarcely less surprising that their successors, in Mackenzie's Government, or in Macdonald's second Government, men like Dorion, Laurier, Masson, Caron, should have done the same. Odd? Surprising? It is incredible.

And the "contractual provisions . . . that guarantee French as one of Canada's two official languages," and which "have been allowed to lapse:" what are they? Here is what the Act says: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing

from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages."

Nobody will have the hardihood to say that the provisions of this section for the use of French (or, for that matter, English) in the Legislature and courts of Quebec have been allowed to lapse. What about the Dominion? Is French still spoken in both Houses? It is. Has there ever been a year in the last hundred when it was not? I strongly doubt it. Are the records and Journals of the Senate and House of Commons still printed in French as well as English? They are. Have they ever not been? No. Is French still used in pleadings and processes in the Supreme and Exchequer Courts of Canada whenever a litigant asks for it? If not, when did this right lapse? Are the Acts of the Parliament of Canada still printed in both languages? They are. Have they ever not been? No.

I am not arguing that the rights of the French language as set forth in the B.N.A. Act ought to have been, even then, precisely what they were, let alone that they should now be only what was laid down in 1867. They are now much wider than they were in 1867, and I am glad of it. I am heartily in favour of the general lines of the present Government's policy on bilingualism in the Dominion Public Service. I am in favour of as much bilingualism all across the country as is practicable. But all this is quite different from saying that what, in my judgement, *ought* to be done *now* was in fact laid down in a statute, or in any extra-legal understanding, a hundred years ago.

Let me illustrate the difference by an experience of my own six years ago. One of my trade union colleagues made a speech in which, among other things, he said that English-Canadians, in 1961, still only "grudgingly conceded the rights promised to French-Canadians by the Treaty of 1763." He invited my comments, and got them. I said: "Do you know what rights were promised the French Canadians by the Treaty of 1763? I'll show you, in the pages of Dr. Maurice Ollivier's *British North America Acts and Selected Statutes*. First, the right to worship 'according to the rites of the Romish Church, so far as the laws of Great Britain permit;' second, the right of any of His Majesty's new subjects to return to France, with their movable goods, and the proceeds of the sale of their immovables (provided the sale was to a British subject) within eighteen months of the ratification of the Treaty. Do you seriously mean to tell me that, in 1961, English-Canadians, a large proportion of whom are now themselves Roman Catholics, still 'only grudgingly concede' Claude Jodoin's right to go to Mass? Do you seriously mean to tell me that, in 1961, English-Canadians still 'only grudgingly concede' the right of the

French Canadians of 1763, the last of whom must have been buried a hundred and fifty years ago, to go back to France, with their movable goods and the proceeds of the sale of their immovables, some time in 1763 or 1764?" "Oh! So you think they're entitled only to what they were promised by the Treaty!" "I don't think anything of the sort. I think they are entitled to vastly more; they have got vastly more; and I am in favour of their getting more still. But the statement you made is simply not true."

7) *French schools outside Quebec were guaranteed in 1867.*

They certainly were not guaranteed by anything in the British North America Act. Nor are they guaranteed by anything in the Manitoba Act of 1870, the Saskatchewan and Alberta Acts of 1905, or the Terms of Union with Newfoundland in 1949. There is not one syllable about French schools in any of these statutes. Denominational schools, yes; schools for "the Protestant or Roman Catholic Minority of the Queen's Subjects," yes. French, no.

To this, I have heard two answers.

The first is that in this, as in other matters the Fathers were not very bright, scarcely, indeed, better than a lot of mixed-up kids; that when they said "Protestant" and "Roman Catholic," they meant "English" and "French."

But the provision in the Quebec Resolutions "saving the [educational] rights and privileges" of the "Protestant and Roman Catholic minority in both Canadas" (that is, Ontario and Quebec) was inserted at the instance of Thomas D'Arcy McGee, a Montreal Irish Roman Catholic. It would be a very peculiar Montreal Irish Roman Catholic, then or now, who would say "Roman Catholic" when he meant "French." The wider provision in the London Resolutions, and in the Act, extending the saving clause to all the provinces and providing for Remedial Orders and Remedial Acts, was inserted at the instance of Alexander Tilloch Galt, a Scotch Protestant from the Eastern Townships, egged on by Thomas L. Connolly, the Irish Roman Catholic Archbishop of Halifax. It would be a very odd Scotch Protestant, then or now, who would say "Protestant" when he meant "English," and a positively freakish Halifax Irish Roman Catholic Archbishop who would say "Roman Catholic" when he meant "French."

Second, I have been authoritatively told that in the 1860's, in education, "religious and linguistic were synonymous."

They were not. There were large, and politically important, Irish Roman Catholic communities in every one of the colonies: Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, and both Canadas. In 1871, outside Quebec, the non-French Roman Catholics out-

numbered the French more than two to one, and made up 27 per cent of the total Roman Catholic population of the whole country. It is also worth noting that at the Quebec Conference, there were three Irish Roman Catholic delegates to four French.

I could add an eighth devil of pseudo-history: the flat assertion I encountered last year, at a large Ontario university, that when Manitoba abolished its separate schools, the Dominion did "nothing." This was maintained so stoutly, so positively, so stridently, that I was finally obliged literally to shout down, and metaphorically to shoot down, the pseudo-historians with this: "Was there a Dominion Government Remedial Order to Manitoba to restore the separate schools? There was. I have read it. When Manitoba refused, did the Dominion Government introduce a Remedial Bill to restore the separate schools? It did. I have read it. Did Sir Charles Tupper make a real effort to get the bill through? He did: he kept the House sitting day and night, bar Sundays and dinner recesses, for almost two weeks, and gave up only when Liberal obstruction, and the imminent demise of Parliament by efflux of time, made it plain that the bill had no chance of passing before Parliament came to an end."

Why do I make such a song about these errors, learned or vulgar? Why do I call them "devils"? For four reasons.

First, they cloud the real issues and befuddle people's minds.

Second, some or all of them have been widely accepted by many of the English-speaking "intelligentsia," at least among those I have met in Ontario and Quebec; and they have given these gentry a guilt complex about French Canada, and Quebec, which makes it impossible for them to see straight, and induces in them a compulsive urge to try to make the rest of us see crooked. Confessing one's own real sins, and trying to make amends, is good. Confessing other people's imaginary sins, and trying to get them to make a burnt offering of their country for misdeeds they never committed, is well-meaning, but dangerous.

Third, you cannot build a house on the foundation of bad dreams or sick fancies.

Fourth, most, if not all, of these errors deserve the name of devils because they bedevil, they envenom, the discussion of difficult, delicate, and complex problems on whose solution the very life of this country may depend. It is one thing to argue that English-Canadians ought, now, for good and sufficient reason, to accept constitutional changes which would widen French-Canadian rights. It is quite another thing to base the whole argument on unfounded allegations of bad faith and breach of agreement. It is wrong, and I am convinced that it is also self-defeating. Most English-Canadians will not join in the self-flagellation of the "intel-

lectuals;" they will just get angry, and refuse to listen to facts, and to rational arguments for change, which they ought to hear and be ready to act on. I may add that the undoubted sincerity of the purveyors of all this dangerous nonsense makes it not one whit less nonsensical and only more dangerous; and when they are learned men, as they often are, it is more dangerous still.

A third thing we had better get clear, if the constitutional conferences are not to send our country reeling

through hideous ruin and combustion down
To bottomless perdition,

is that our Constitution is not a toy for politicians or professors to play with; or a canvas on which they can plaster constitutional surrealism or modern abstracts or pop art. Nor is the amending or re-writing of it an opportunity to show how much they know and how clever they are; nor an exercise in providing school children with inspiring memory work, nor a chance for constitutional tailors to fashion for us something rich and strange out of a rag-bag of bits and pieces from other Constitutions. A Constitution should be a working plan for governing a community, and the emphasis is on "working." The constitutional draftsman is an architect, not a painter. A *Canadian* Constitution should be a working plan for the peace, order, and good government of the *Canadian* community. The most important thing about it is not that it should be pretty, or incorporate the latest thing from Paris or Moscow or Bonn or Westminster or Brasilia or Canberra, but that it should *work*, and work for *Canada*. We should certainly be ready to learn from other countries, and to borrow and adapt from their Constitutions anything which will fit *our* needs (as indeed we have done, abundantly, from both Britain and the United States, and may soon be doing from the Scandinavian countries). But it is no argument for sticking something new into our Constitution simply to say that they already have it in West Germany or the Soviet Union or the Romanian People's Republic, or that they had it in the Roman Empire or the Kaiser's Germany or Austria-Hungary. ([Anyone] . . . who . . . [heard] . . . Professor Jacques-Yvan Morin's travelogue at the Canadian Political Science Association meetings . . . [in June 1966] . . . will know that this is not as fanciful as it sounds.) Mediaeval Poland had a *liberum veto*; it does not follow that Canada should do likewise, as one proposal for reconstituting the Senate would have it.

We hear a great deal, most of it pretty silly, about our lack of a "Canadian identity." Anyone who compares our Constitution with any other will soon discover that, constitutionally at least, we unmistakably *have* an identity: our Constitution differs markedly from any other, as,

indeed one might expect, and as it should, since it is intended to govern us, not some other people; and we differ markedly from even those from whom we have inherited, or borrowed, or absorbed, most: the British, the French and the Americans. I cannot for the life of me see how we shall enhance our identity by trying to make ourselves look more like somebody else. We might only produce an object resembling a dog friends of mine once had: "an Alsatian body on a dachshund chassis."

. . . I now want to address myself to certain things that we English-speaking Canadians need to have a firm grasp of.

First . . . we must try to understand the position of French Canada as a tiny island of people who speak French in a vast North American sea of people who speak English and an island upon which that sea beats incessantly and thunderously. We should try to imagine what it would be like if *we* were the island and *they* the sea; if, let us say, the province of Ontario, with certain adjacent parts of Quebec and Manitoba, and a few pockets in Newfoundland, Nova Scotia, and British Columbia, were the only English-speaking area in an otherwise French-speaking North America; and if, moreover, our ancestors had been in this territory long before the French, and had explored much of the rest before the French; and if we were told, by the French-speaking Canadians that the whole of Canada was our country and the whole of Canada ought to command our loyalty. Suppose that the national capital was in Hull, not Ottawa; that Hull and adjacent counties had a considerable English-speaking population; that, though our language had certain rights in the Dominion Parliament and Dominion Courts, it had none whatever in the Legislature and Courts of Quebec or any other province; and that even the street signs in Hull, the national capital, were all in French. Suppose, further, that we found our English-speaking people spreading out into parts of Quebec and other predominantly French-speaking provinces, where English had no official status and English schools no constitutional guarantees.

Might we not be asking for wider rights for the English language, and guarantees of English education for English-speaking children wherever the parents wanted it, and there were enough such children to make it feasible? Mightn't we perhaps feel that Ontario was not a province like the others; that it was the citadel of English-speaking Canada, and as such had to have certain special powers? Mightn't we even have an English-speaking separatist movement?

At this point, I can imagine some of you saying, "Oh! Here we go again! The familiar slush about the poor, down-trodden French-Canadians, the familiar attempt to soften us up to give them anything they ask for, the familiar invitation to English-speaking Canadians to array them-

selves in sackcloth and ashes and set the welkin ringing with cries of 'Mea culpa, mea maxima culpa!'

Not at all. With any such attitude I have less than no sympathy. But I have already said that there are basic facts of the *whole* Canadian situation which we must *all* recognize. What I am now saying is there are basic facts of the *French-Canadian* situation which *English-Canadians* must recognize. In my judgement, these facts by no means support all the claims that any particular French-Canadian may make; any more than, if the situation were reversed, the reverse set of facts would support all the claims that any particular English-Canadian might make. Just what claims the facts do support is one of the central questions which need rigorous, if sympathetic, examination and rational discussion.

I would go this much farther: that a satisfied majority, just because it is a satisfied majority, has a special obligation to try to understand the situation of a dissatisfied minority. We are the predominant partner; we are, by and large, satisfied with the present terms of the partnership; the other partner is not. If we want the partnership to continue, then we must try to understand why the other partner is dissatisfied, so that we can see whether there are changes in the terms which will satisfy him without reducing the partnership to a cobweb or destroying it altogether. If it turns out there are not, then we shall have to start thinking about the terms on which to end it.

But while there is an obligation on us to try to understand the French-Canadian situation, and to listen to what French-Canadians have to say, there is also an obligation on them, to understand *our* situation and listen to what *we* have to say. We hear a great deal about the necessity of a "dialogue." My dictionary says "dialogue" means "a talking together, a conversation." But for a good many of those who are now using the word so freely, both French-Canadians and their English-Canadian supporters, it seems to mean, "I'll talk; you listen;" or even Mussolini's, "Hear, believe and obey."

The constitutional conferences ought to be a dialogue, but a real dialogue, not the Mussolini kind; and English-Canadians ought to go into them ready to listen but also to speak. We have plenty to say, and plenty that is worth saying. The French-Canadians have their history, their traditions, their culture; and we know too little of them. But we have *our* history, *our* traditions, *our* culture; and they know too little of that.

A few years ago, in our French United Church paper, a young French-Canadian student wrote that the French-Canadians were the only Canadians who, in any appreciable degree, had a "culture;" the rest had

really nothing worth mentioning. I protested. I pointed out that he implied English-speaking Canadians had no art, no literature, no music; which was simply not true. Granted, not all our artists, poets, novelists, and musicians were geniuses, or their works masterpieces; but were all the French-Canadian artists, poets, novelists, and musicians geniuses, all their works masterpieces? Surely, in both cases they were a mixed bag. A week or so later, I happened to be breakfasting with a very intelligent and well-educated French-Canadian colleague, to whom I told the story with some amusement. To my utter astonishment, his reply was: "Ah! M. Forsey! You do not understand French." (Our whole conversation was proceeding in French.) "You think this young man was saying that there are no cultured English-Canadians. That is not what he was saying at all. We all know that there are many cultured English-Canadian individuals. All he meant was that there is no English-Canadian culture." I replied: "Thank you very much, M. Un Tel. But, deficient as my French may be, that is exactly what I understood him to mean, and exactly what I was protesting against, as both untrue and insulting." It was his turn to be astonished. If I had told him the Pope had joined the Orange Order, he couldn't have been more staggered. Clearly, it had never struck him that we had so much as a single English-Canadian painting or sculpture or poem or novel or symphony or composition of any kind. He could only stammer out, "But surely your art and literature and music are very heavily influenced by English and American art and literature and music?" I said, "Yes, of course they are. And are yours not influenced by French art and literature and music? But they still exist, and they are quite distinctly yours. I agree that English-Canadian ignorance of your culture is deplorable; but you do not remedy a bad situation by turning it upside down."

I said, a few moments ago, "*our* history". And let us make it quite clear that it *is our* history: not the history of our forebears in England, Scotland, Ireland, Holland, or any other of the old countries, but *our* history *in this country*. I have sometimes noticed a patronizing tendency in some French Canadians to talk and act as if the rest of us were just commuters from London or Dublin or Edinburgh, or, at best, Englishmen, Irishmen, Scotsmen who happened to be living on Canadian territory, but who had no roots here, and no loyalty except to England, Ireland or Scotland. This is not so . . . [Newfoundland, Nova Scotia] . . . New Brunswick . . . [Prince Edward] . . . Island (and even Ontario!) have been here a long time. The roots of most of their people go deep into Canadian soil. Most of my ancestors, and most of yours, were in this country close to two hundred years ago, some of them more; and some of them had been on this continent for more than a century before they

came, or were driven, here (we can match the expulsion of the Acadians with the expulsion of the Loyalists). I do not mean by this to disparage those who came later, and who are often better Canadians than some of the older stocks. They, or their fathers, *chose* to be Canadians, which may be one reason why they are prouder of their Canadianism, and more energetic about it, than some of us who are what the Quakers might call "birthright Canadians."

We English-speaking Canadians are *Canadians*. Those of us who are of British ancestry are, or ought to be, proud of that heritage, "and of the Imperial fountain of our freedom;" all of us, I hope, feel a pride in, and attachment to, our world-wide, inter-racial Commonwealth (to whose development, incidentally, such French Canadians as Laurier, Lapointe, and St. Laurent made a series of decisive contributions). All of us, I hope, feel also a pride in, and attachment to, the historic provincial communities we belong to. But first and foremost we are Canadians; that is where our primary loyalty lies. I notice that some French-Canadians, recently, have accepted, and even with enthusiasm, General de Gaulle's description of them as "Frenchmen of Canada." I doubt if you could find a baker's dozen of English-speaking Canadians who would put up with anyone's calling them "Englishmen of Canada;" and I am perfectly certain that if Harold Wilson tried it, or came here and shouted from a balcony in Toronto, "Long live free English Canada," with an assurance that England would stand behind "you Englishmen of Canada in your struggle against French domination," or anything of the sort, he would be sent home double-quick, with a flea in his ear.

The French Canadians have made their massive, their invaluable, contribution to this country. But so have we. Our most notable contribution has been the basically English . . . constitutional law and practice of the whole country and of every province: the system of parliamentary, responsible Cabinet government. The French-Canadians have made a notable contribution to the development of the specific Canadian variety of that genus; but so have we.

When we go into the Conferences, we should never forget that we are mortal, fallible, human, imperfect; that, like everybody else, in many instances "we have left undone those things which we ought to have done, and done those things which we ought not to have done and there is no health" (that is, no wholeness) "in us." But I see no reason why we should act as if we had a *double* dose of original sin, still less why we should assume that the representatives of French Canada have stepped straight from the angelic choir, and that anything they say automatically becomes a part of divine wisdom. They are just as mortal, fallible, human, imperfect, as we are; and error is still error, folly is still folly, nonsense is still

nonsense, whether it is uttered by an English-Canadian, a French-Canadian, a Dutchman, or a Tanzanian, and whether spoken in English, French, Italian, Spanish, or Swahili. And if you think that is a platitude, you just ought to see and hear and read some of the English-speaking "intellectuals" I hear and see and read almost every week of the year.

We should go into these Conferences without prejudices, as far as we can, but not without convictions; without arrogance, but not without self-respect; erect, not on all fours; to play the parts of men, not lumps of putty or nodding plaster images. We should not stick to the old merely because it is the old, but neither should we be seduced by the fallacy that all change is progress. We should be inspired by Christian love, not a sickly desire to *be* loved.

Christian love is *not* witless amiability, or absolute unselfishness. "Thou shalt love the Lord thy God . . . with all thy *mind*"; or, as our French Protestant Bible says, "Tu aimeras l'Eternel ton Dieu . . . avec toute ta *pensée*", all thy *thought*. "And the second commandment is like unto it: thou shalt love thy neighbour *as thyself*", "*comme toi-même*." If, then, our love of our neighbour is to be "like unto" our love of God, it must be a love in which we use our *minds*, in which we *think*; and if we are to love our neighbours *as ourselves*, we must love ourselves, respect ourselves. We must will the good of our neighbour, which involves using our heads to discover what that good is.

This does not, of course, mean that we must proceed to impose on him what *we* think is good for him. But neither does it mean that we must incessantly, instantaneously, invariably, give him anything he happens to take it into his head to want. Nor does it mean that if he dislikes our faces, we must undergo plastic surgery. That would not be Christianity, just appeasement. If our ethic is simply to give our neighbour everything he fancies, if his mere likes and dislikes become our rule of conduct, the only result can be the flight of reason from human affairs; the triumph of the egotistical, the grasping, the brutal; and, in the life of the community, the dictatorship of whoever can shout the loudest, or shake the biggest fist, or make the biggest nuisance of himself.

I used the word "appeasement" advisedly. The drama of appeasement is being played out again on the domestic stage right under our noses. Dorothy Sayers . . . [in her book, *Unpopular Opinions*] . . . has a chapter on Britain between the wars, and what made British politicians and the British people behave as they did. The chapter is headed, "They Tried to be Good," and it describes how "the Voice of Enlightenment," "the good and intellectual people," led "the Flight from Reason," and till almost the very outbreak of war, persuaded the British people that resistance to German demands was "naughty;" until at last it looked as if

Britain had become "blind, deaf, dumb, paralytic and imbecile, without hope of recovery." The same kind of people have been doing the same kind of thing here, and with a frightening degree of success. We have plenty of Runcimans, plenty of would-be Chamberlains; we shall be very lucky if we escape a Canadian Munich, which will accept, for example, the proposals of the Quebec provincial Liberal party's constitutional committee (the committee itself says frankly that it expects this); a Canadian Munich that would produce an agreement which would be hailed as a triumph of goodness, realism, moderation and sweet reasonableness, and which would last just about as long as the original Munich agreement.

But, even at this eleventh hour, this need not happen, if we will use our heads and show what Sir Robert Borden called "nerve and backbone." French-Canadians, even Quebec French-Canadians, are not unanimously behind the demands for separatism, or Associate States, or the hemi-demi-semi-separatism of the Quebec provincial Liberal party's constitutional committee. And the French-Canadians who see just what such proposals would mean for the ordinary Quebec worker and farmer and fisherman and miner, and for the French-speaking minorities in the other provinces, are resisting: speaking for Canada, fighting for Canada. They need to have us speak for Canada and fight for Canada too. They need to have visible and audible evidence, from us, English-speaking Canadians, that we are not prepared to cut off our arms, our legs, and ultimately our heads (though in some cases that might hardly be noticed) to please people in a state of psychological disturbance; people who, if they got what they wanted, would (though with the best intentions) gravely injure, first and foremost the ordinary citizens of Quebec, then the French-speaking minorities outside Quebec, last and not least the English-speaking population of Canada.

There are other things we must be on our guard against in our constitutional discussions.

One is magic words and phrases.

Perhaps the most notable of the magic words is "moderate." Over and over again, I have been told that Mr. X's hair-raising proposal is "moderate," because it is rather less hair-raising than Mr. Y's. Specifically, I have been told, times without number, that this or that proposal is "moderate" because it does not involve immediate outright separation of Quebec from the rest of Canada. Well, as my friend Professor Donald Creighton once remarked, the man who asks me to jump out of a third storey window can, I suppose, be described as "moderate" by comparison with one who wants me to jump from the seventh storey; but in either case I shall be dead.

Let us expunge from our vocabulary, for these constitutional discus-

sions, this misleading and irrelevant word. Let us ask, of any proposal not, "Is it more, or less, crazy than some other?" but "Is it sensible? Will it work? Is it the proposal which will best serve the purpose its advocates have in view? Will it do good, or harm; and, if it is likely to do both, will it do more good than harm, or less?"

Second, let us not be bamboozled by statements that we "do not understand French," and that if only we did, we'd realize that what looks to us like a sabre-toothed tiger is really the gentlest of tabbies, asking only to be allowed to lie purring on the family hearth, oblivious of a possibly impending divorce.

Two examples of this gambit will suffice.

The first comes from a small meeting I attended last year. Among those present was a high Quebec personage who must remain nameless, but who had been held up to me beforehand as the very model of learning, wisdom, responsibility, and, of course, "moderation." At a very early stage in the proceedings, this gentleman undertook to straighten us out on our "misunderstanding" of the word "auto-détermination," which he translated "self-determination." "Now, to you English-Canadians, this means 'separatism.' But this is not so at all. All it means is that in the new Constitution" (note the bland, question-begging assumption that there is going to be "a new Constitution") "there should be an Article, let us say, Article 26, which will give Quebec the legal right to secede. That is all. This is not separatism. We are not saying we will secede: all we want — and this is not an official demand" (pause, and a roguish twinkle) "yet! — is the right to separate if we see fit."

The second example of the "you do not understand French" gambit is, of course, the famous, or infamous, "deux nations," "two nations." We are told, *ad nauseam*, that the French word "nation" means only "a cultural and sociological group;" and who could object to recognizing that the French-Canadians are a distinct cultural and sociological group?

But the French word "nation" *does not* mean only a cultural and sociological group. It is all very well to tell me, and perhaps most of you, that we do not understand French. But it will hardly do to tell General de Gaulle that he doesn't. Yet General de Gaulle told Mr. Pearson, on January 16, 1964, that he wanted Canada to be "une nation forte et unie." "a strong and united nation." Did he mean that he wanted Canada to be a strong and united cultural and sociological group? If so, he was expressing a wish that either French Canada or English Canada should disappear, which would be blatant nonsense. The fact is, of course, that "nation" or "nation" has at least two meanings in both languages; and what some of our learned men, and the poor innocents who follow them, apparently cannot get into their heads is the fatal ambiguity of the

unqualified phrase "deux nations" or "two nations," and the ease with which a skilled verbal conjuror (and Quebec is full of them) can make it mean at his convenience, either cultural and sociological "nations" like Scotland, Wales, England, Wallonia, or Brittany, or political "nations" like the United Kingdom, France, and Canada. M. Daniel Johnson, in his September, 1966, brief to the Dominion-provincial Fiscal Conference, actually performed this sleight-of-hand within the space of two pages. On page 2, French Canada was "a nation, in the sociological sense of the term;" on page 3, he was demanding that this sociological "nation" should have "juridical and political recognition in the new Constitution."

As long as we allow ourselves to be fooled by this kind of verbal juggling, we shall be sitting ducks for every separatist, or hemi-demi-semi-separatist in the country. We shall find ourselves, for one thing, agreeing that Quebec has a clear right to membership in the United Cultural and Sociological Groups, commonly known as the United Nations.

Another magic phrase is, "a true federalism," "a genuine federalism," "un fédéralisme authentique." The present Supreme Court of Canada, for example, won't do because its judges are all appointed by the Dominion. In a "true federalism," they would not be. Indeed? So the United States is not really federal? Besides, who says what "a true federalism" is? And who says this country must have a Constitution which conforms to this or that theoretical notion of "a true federalism"? Our Constitution should meet our needs, not be hacked and chopped to fit some text-book writer's Procrustes' bed.

This appetite for general principles, from which all the rest of a constitution can then be deduced with rigorous scholastic logic, is very strong in contemporary French Canada (though the French-Canadian Fathers of Confederation seem to have been completely free of it, perhaps because to them it seemed fraught with all the horrors of the French Revolution). It is something we shall have to take account of, something to which we may have to make certain concessions. But they had better be "certain": precise, carefully thought out, agreed to only after we are quite sure what practical consequences they involve. It is altogether too easy to fall into the trap of accepting some innocent-looking general principle, only to find that, worked out to its logical conclusion, it will deprive us of our shirts, trousers, shoes and socks, leaving us with only our underclothes and our neckties.

Last spring, for example, at the Canadian Political Science Association, we were told that we must "accept" the "principle" of a "special status" for Quebec. The proponents of "special status" in Quebec itself were not, indeed, quite sure just what it would contain, which specific powers would have to be handed over by the Dominion to the province.

But we must accept the principle; later they would decide what it was to mean in practice. There were cries of outrage when I said this was asking us to sign a blank cheque. But what else is it? And why should we?

A few months later, in a public discussion, an eminent English-Canadian lawyer said it was not a blank cheque but simply a "bargaining position;" adding, to the delight of the audience, that he was surprised that I, with my trade union experience, should be so perturbed by a "bargaining position." I was not quick enough to think of the obvious answer at the time, but I did some days afterwards, and wrote him. Had he ever heard of a union going into negotiations with an employer with this proposition: "We are not sure yet what, precisely, our demands will be. We may ask for a 50 per cent increase in wages; or a four-hour, two-day week; or a six-months' annual vacation; or a hundred paid statutory holidays per year; or pensions of \$500 a month at age 50; or some combination of any or all of them. But you must first accept the demands; then we'll let you know what they are"? I got a very courteous answer to my letter, but none to my question.

Let me add at once that I am not saying that there is no room for specific further special powers for Quebec, or any other province. Quebec already has a "special status" in the existing Constitution, in a number of ways. It is the only province with official bilingualism; it is the only province which cannot divest itself of its jurisdiction over property and civil rights; it is the only province with any constitutional restriction on its power to redistribute the seats in its Legislative Assembly. At least seven other provinces also already have, in one way or another, a "special status" under the B.N.A. Act; and I can see no objection to giving any province a particular power or powers *merely* on the ground that this would make it different from the others. But I want to know first *what* power or powers, and why, and what the effect would be on the rest, and on the country as a whole. If someone can prove to me that he needs fifty dollars, and if it seems clear that my giving it to him will help him and hurt no one else, or at least help him more than it will hurt me, or anyone else to whom I might otherwise have given the money, well and good. But there is all the difference in the world between that and handing him a blank cheque, especially as, if he fills it in with a big enough figure, he will find it's N.S.F.

Now having uttered my warnings about the attitude with which we should enter the constitutional conferences, and the booby-traps we should beware of, what do I suggest we should *do*?

First, be ready to examine, and discuss, thoroughly, meticulously, any specific proposal, bar none, on any subject; "examine" and "discuss," *in*

the light of the facts, and by the light of reason as far as frail mortals can get to it.

Second, we should also be prepared to put forward our own proposals, and have them subjected to the same rigorous examination and discussion.

We should, moreover, be ready to *adopt* any proposals which can prove themselves. We don't want to spoil the ship for want of a ha'p'orth of tar, but neither do we want to punch holes in it to please people who prefer to put to sea in a sieve.

And in all the discussion, we are just as much entitled to say that something is "not negotiable" as the French-Canadians are to say that some demand, or bundle of demands, of theirs is "minimum." I gather, from the press reports, that at the Conservative Montmorency Conference, "minimum" was respectable and "non-negotiable" was not. This is intolerable nonsense.

Third, we English-speaking Canadians must be ready to pay the price of the "one Canada" I hope most of us want. My old Scotch tutor at Oxford used to say there were two ways of wanting a thing: "really wanting it" and "un-really wanting it." If you really wanted it, you were willing to pay the price for it; if you were not willing to pay the price, then you only *un*-really wanted it. I think the price is, briefly, something like this: (1) bilingualizing the Dominion administration just as much and as fast as possible; (2) making as sure as we can that French-Canadians get their full share, just as big a share as they show themselves willing and able to take, in running the business, public and private, of the whole country; (3) providing French education for French-speaking children all across the country, wherever there are enough of them and the parents want it; (4) extending French radio and French television all across the country wherever there is any need for it (and, if we succeed in substantially bilingualizing the Dominion administration, it might be needed even in overwhelmingly English-speaking areas, to help English-speaking children prepare themselves for careers in the Public Service of Canada); (5) extending official bilingualism to other provinces where, and as far as, necessary and practicable.

I interrupt my main argument here to emphasize two things.

First, that the more "special" the status Quebec gets, the nearer it gets to making itself a foreign country, the less French-Canadians can expect in the way of representation in the Dominion Cabinet, bilingualism in the Dominion Public Service, and French radio and television all across the country. I should hope that even a Canada from which Quebec has seceded would give its French-speaking citizens at least the language rights they already enjoy in the Dominion Parliament and Courts, French

education for their children wherever there were enough of them and the parents wanted it; French radio and television wherever it was needed; their due share in running the business of the whole country; and official bilingualism in any of the remaining provinces where, and as far as, necessary and practicable. I should certainly fight for such rights. But, manifestly, much that is appropriate and reasonable in a country where French-speaking people make up 28 per cent of the population would be neither appropriate nor reasonable in a country where they made up only 7 per cent.

To put it bluntly: I think the English-speaking people of Canada can be sold a policy of "bilingualism and biculturalism" (within the limits of practicability) "or bust." I do *not* think they can be sold a policy of "bilingualism and biculturalism *and* bust." The nearer Quebec takes us to "bust," the farther it will push us from bilingualism and biculturalism.

Second, I hope you notice how often I have said "possible" or "practicable," or the like. Some of those who genuinely want one Canada, with the French-Canadians playing the fullest part in it, have gone so far as to suggest that all the Legislatures and Courts of all the provinces should be made officially bilingual; which, of course, would mean, among other things, that all the Acts, records and Journals of all the Legislatures would have to be in both languages. This is something that cannot be done, except in New Brunswick and just barely possibly in Ontario, though this latter I strongly doubt. You simply cannot get the translators. There are too few of them, even if you scour the world; they are in great and increasing demand, especially in this country; and, accordingly, they come very high. If we undertake to make all the provinces officially bilingual, we shall be promising what we cannot perform, and I can think of nothing more dangerous. It is better to promise two thousand and pay it, than to promise ten thousand and pay ten cents on the dollar. To be less than frank with our French-Canadian fellow-citizens, in this and other matters, is to treat them not as equals, not as grown-up, reasonable men and women, but as spoiled children. It is also to treat them as children so stupid that they won't realize they've been fooled until the promised goodies fail to appear, and will then just utter the French equivalent of what an old Newfoundland relative of mine used to say: "Thus 'tis, me dear, and couldn't be no 'tizzer."

To return to my main argument: I think we ought also to be ready to consider not merely transferring Dominion powers to the provinces, but the opposite as well. A very fair case could be made out for a paraphrase of Dunning's celebrated motion: "That the powers of the provinces have increased, are increasing, and ought to be diminished." The unquestioning assumption of the contrary is certainly irrational. Perhaps, on

examination, it may turn out that all, or most, of the changes should be in favour of the provinces. But perhaps not. Perhaps the financial burden of the provinces could be lightened by relieving them of some responsibilities which could be more efficiently discharged by the Dominion. I suggest we could, with advantage, revive the Fathers' original criterion for deciding where jurisdiction ought to be: general interest and local interest. This may be a counsel of perfection; I sometimes feel that provincial Premiers do bestride our narrow Canadian world like Colossi; but I am still not without hope that they may rise to the height of that great argument in which they are about to engage.

I have one piece of advice to give the French-Canadian participants in the Conferences, or at least those of them who want to preserve a real Canada. They will find English-Canadians much more willing to take pride (as I do) in our dual tradition; much more willing to see bilingualism as an asset (as I do), not a liability; much readier to appreciate the French tradition, the "French fact" in Canada, if French-Canadian demands are less often coupled with loud contempt for the British tradition, the "British fact" in Canada (which, incidentally, saved the French-Canadians from being swallowed by the United States, and gave them the democracy they now enjoy), and with demands that we throw our tradition overboard. Spitting in our eye is *not* the best way to put us in a receptive, understanding, appreciative, accommodating frame of mind.

Finally, I hope Canada, one Canada, including Quebec, will survive the present *sturm und drang*. It will certainly not survive the kind of "special status" that is now being widely demanded for Quebec, in which that province would become for most purposes a foreign country, but would retain its full representation in the Canadian Cabinet and the Canadian Parliament, and therefore a powerful, often a decisive voice in what, by Quebec's own will, would have become the purely domestic affairs of the other nine provinces. That would be a form of neo-colonialism from which the other nine provinces would speedily demand release. Better, far better, complete separation. This would be a sad end to a great enterprise; for me, and for many others, French-speaking and English-speaking, it would be an inexpressible personal tragedy. But the hemi-demi-semi-separatism which both Government and Opposition in Quebec now seem to want would only prolong the agony. A half, or three-quarters, or seven-eighths, independent Quebec, would be only a moving tent, nightly pitched a day's march nearer the home of complete separation; and it is not worthwhile braving the chill winds that would whistle through it.

But could Canada without Quebec survive? I used to say, "Probably not." I have changed my mind. I do not think our Succession State need

collapse, or fall into the maw of the United States. It would still have plenty of reason to exist: Quebec is not the only thing that makes this country different from the United States, not by a long chalk. There is no need whatever to allow ourselves to be scared into a "bi-national" paralysis by dire warnings that otherwise the American bogeyman will get us. Let us make every reasonable effort, every reasonable concession, to keep Quebec as part of a single Canadian political nationality; every *reasonable* concession: we cannot provide the dry water, sour sugar, boiling ice, stationary motion, which most of the "special status" proposals demand. But if the effort fails, as I am afraid it well may, let the rest of us, English-speaking and French-speaking, face the future without Quebec, in a Canada truncated, indeed, but viable, united and free:

One equal temper of heroic hearts,
To strive, to seek, to find, and not to yield.

What Is Wrong with the British North America Act?

C. R. Magone

Since Centennial year, when the B.N.A. Act became 100 years old, attention has been focused on that Act and more and more people have been appearing in print with their two cents' worth (which, in a lot of cases, is an overvaluation). In all this literature I have read nothing that points out what is essentially wrong with the B.N.A. Act as an instrument of government. The criticisms are usually couched in generalities.

Our neighbours in Quebec are the worst offenders in this respect, talking about a "special status" for Quebec (which, by the way, they now have under the present Act) or about an "associate state" (which on the surface is utter nonsense) without attempting to explain precisely what these terms mean to them. Do they mean that Quebec will have separate customs laws, defence forces, postal service, monetary system, naturalization, criminal law, and weights and measures? Will the province independently appoint and pay its own judges? Will the Queen, the Governor General, or Lieutenant Governor have a different status in Quebec? If not all of them, which of these possibilities are envisaged in the new "special status" or "associate state" idea?

Criticisms of the B.N.A. Act by some writers in the other provinces are equally fatuous, couched in the same general terms: "it is old and therefore cannot be an effective instrument to meet conditions in a modern society." Old age can be charged against many laws, some good and some bad; but age itself is not a fair criterion of merit. Magna Carta and habeus corpus are obvious examples.

It has been claimed that the Law Lords of the Judicial Committee of the Privy Council so interpreted the Act that the Fathers of Confederation would not recognize their own brainchild. (Conveniently, none of them is around to support this idea.) The critics go even further. The

Fathers of Confederation (they argue) intended the provinces to be little more than glorified counties with minor legislative responsibilities, but the Judicial Committee by its decisions emasculated the powers of the dominion and practically rewrote the Act. If the Fathers of Confederation did so intend, they must accept the responsibility for inadequate drafting. In fact, they gave to the "glorified counties" exclusive legislative power, among other things, over amendment of the provincial Constitution except as regards the office of Lieutenant Governor, notwithstanding anything in the Act; solemnization of marriage; property and civil rights in the province; education; the administration of justice, including the constitution, maintenance, and organization of provincial courts, both civil and criminal. Do these powers sound like the powers of "glorified counties"?

That august tribunal, the Judicial Committee of the Privy Council, comprising the hierarchy of the judicial system of Great Britain, had the job of interpreting seemingly contradictory provisions in the division of legislative powers between Parliament and the provincial Legislatures and of fitting them together into a workable whole. They did the job, and damned well too. To read the critics of their decisions, one would think they were a bunch of buffoons.

What the B.N.A. Act Did

It might not be amiss to attempt a thumbnail sketch of what the B.N.A. Act did.

In 1840 the two provinces of Upper and Lower Canada had been united by the Act of Union, to form one province, the Province of Canada. The new Province of Canada was to be governed by one Legislative Council and one Legislative Assembly. The B.N.A. Act in 147 sections, divided in eleven parts, provided for the union of the three provinces of Canada, Nova Scotia, and New Brunswick and for the admission into the union of other colonies, provinces, or territories.

Part 1 was preliminary, providing for the Proclamation bringing the Act into force and dividing the Province of Canada into the province of Ontario and the Province of Quebec; that part which was formerly the Province of Upper Canada constituted the province of Ontario, and that part which was formerly the Province of Lower Canada constituted the Province of Quebec.

Part 2 created three new governments: the dominion government and the governments of Ontario and Quebec. The provinces of Nova Scotia and New Brunswick were, subject to the provisions of the Act,

to continue as they existed at the passing of the Act with respect to territorial limits, the constitution of the executive authority, and the constitution of the Legislature.

Parts 3 and 4 provided for the executive government of the dominion and the creation of a Parliament consisting of the Queen, the Senate, and the House of Commons on the United Kingdom model. The provinces were to be represented in both branches of Parliament.

Part 5 similarly provided for the executive authority and the Legislatures of Ontario and Quebec, Ontario to have one chamber and Quebec to have both a Legislative Assembly and a Legislative Council. Provision was made also for the appointment by the Governor General in Council of a Lieutenant Governor for each of the four provinces.

Part 6 contained the important provision dividing all legislative powers between the Parliament of Canada and the Legislatures of the provinces. This part has been the chief source of litigation between Canada and the provinces.

In Part 7 authority was vested in the Governor General to appoint judges of the superior, district, and county courts, except those of the courts of probate in Nova Scotia and New Brunswick, with provision for the tenure of office and payment by Canada of the salaries and pensions of the superior, district, and county court judges. This part provided also for the creation of a general court of appeal and the establishment of additional courts for the better administration of the laws of Canada.

Part 8 provided for the creation of Consolidated Revenue Funds for Canada and the provinces, the division of public works and property, liability for debts of the provinces, and provincial subsidies.

Part 9 contained miscellaneous provisions respecting the oath of allegiance; continuation of laws in force at the date of Confederation, subject to being repealed or altered by Parliament or by the provincial Legislatures in accordance with division of legislative powers under Part 6; the use of both the English and the French languages in the Parliament of Canada and in the Houses of the Legislature of Quebec, in the respective records and journals of those Houses, in any pleadings or processes in or issuing for any court of Canada established under the Act, and in or from all or any of the courts of Quebec. Other provisions related to treaty obligations and arbitration in respect of the division of debts, credits, and properties between Ontario and Quebec.

Part 10 was repealed. It had to do with the building of the Inter-colonial Railway.

Part 11 authorized the admission into the union of the provinces of Newfoundland, Prince Edward Island, and British Columbia, Rupert's

Land, and the Northwest Territories. (The amendment of 1871 provided for the establishment of new provinces by the Parliament of Canada out of the territories forming part of the dominion.)

Of the original 147 sections of the B.N.A. Act, some have been repealed by Imperial legislation; others are obsolete because the event they referred to is past, or for other reasons; a number have fallen into disuse by the development of constitutional practice; and others have been superseded by dominion or provincial legislation passed pursuant to powers given in the Act itself.

Constitutional Amendment

The simple fact is that the B.N.A. Act has stood the test of time. There is nothing fundamentally wrong with the Act today. It is the instrument under which Canada has grown and developed from colonialism to nationhood. How could this transition have taken place if the B.N.A. Act had not been designed to take advantage of progress? It could and did take place because we are blessed with a Constitution "similar in principle to that of the United Kingdom", as stated in the first paragraph of the Preamble.

This is not to say that some tidying-up should not be done; but it should be done, when it is done, in Canada and not by Act of the Imperial Parliament. The one great need is to obtain power, in one last approach to the Imperial Parliament, to amend the Constitution by Act of Parliament of Canada. The Fulton-Favreau formula, which was a draft of a statute to be passed by the United Kingdom Parliament to accomplish this purpose, was agreed to unanimously by a conference of the Prime Minister of Canada and the prime ministers of all the provinces, including Quebec, in Ottawa in October 1964. It was subsequently accepted and approved by the Legislatures or the Legislative Assemblies of all the provinces except Quebec. And there it hangs after forty years of abortive struggle. The Government of Quebec, for some reason, changed its mind.

The irony of the situation is that in accepting the Fulton-Favreau formula the federal government for the first time agreed to the repeal and rewriting of section 91, head 1, of the B.N.A. Act, in line with the submissions of some of the provinces, including Quebec. The dissatisfaction of the provinces with this section was raised at the Federal-Provincial Conference of Attorneys General in 1950. Head 1 of section 91 was enacted in 1949 by the Imperial Parliament at the request of the Government of Canada on the Address of the Parliament of Canada. The Parliament of Great Britain was approached without prior consultation with

any of the provinces and over the protest of some of them who had notice of it. Prime Minister St. Laurent stated at that time that the provinces were not consulted because the amendment referred only to matters of purely federal concern. I have no doubt that when he made that statement he truly believed it. I think he later realized that it had much broader implications.

The fact is that under the 1949 amendment, the Parliament of Canada, without consulting the provinces, may amend the B.N.A. Act in a number of areas of vital interest to the provinces. The amendment (with the heading to section 91, which is important) is as follows:

91. It shall be lawful for the Queen, by and with the Advise and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces: and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (*notwithstanding anything in this Act*) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say:—

1. The amendment from time to time of the constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a Province; or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirement that there shall be a session of the Parliament of Canada at least once each year, and no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

Thus, *notwithstanding anything in the B.N.A. Act*, the Parliament of Canada is given exclusive legislative authority to amend the Constitution of Canada except for the five exclusions:

1. As regards matters coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, or
2. As regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or Government of a Province, or
3. As regards rights or privileges by this or any other Constitutional Act granted or secured to any class of persons with respect to schools, or

4. As regards the use of the English or the French language, or
5. As regards the requirement that there shall be a Session of the Parliament of Canada at least once each year, etc.

Therefore, in my opinion, the Parliament of Canada today has the power to change or repeal the provisions respecting the position of the Queen or the Governor General, and to amend the provisions respecting the appointment, qualification, and tenure of senators; the representation of the provinces in the Senate; the principle of proportionate representation of the provinces in the House of Commons; the privileges, immunities, and powers of the Senate and House of Commons; the appointment and tenure of superior and county judges and many others. In my opinion it could have passed the amendment altering the life tenure of superior court judges, which the Imperial Parliament was requested to pass in 1964.

In contrast, section 6 of the Fulton-Favreau formula protects the rights of the provinces in relation to matters which are of vital concern to them. It is more restrictive in its opening provisions as well as in its exclusions. Section 6 reads as follows:

6. Notwithstanding anything in the Constitution of Canada, the Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada in relation to the Executive Government of Canada, and the Senate and House of Commons, except as regards:

- (a) the functions of the Queen and the Governor-General in relation to the Parliament or Government of Canada;
- (b) the requirement of the Constitution of Canada respecting a yearly session of Parliament;
- (c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons, except that the Parliament of Canada may, in time of real or apprehended war, invasion or insurrection, continue a House of Commons beyond such maximum period, if such continuation is not opposed by the votes of more than one-third of the members of such House;
- (d) the number of members by which a province is entitled to be represented in the Senate;
- (e) the residence qualifications of Senators and the requirement of the Constitution of Canada for the summoning of persons to the Senate by the Governor-General in the Queen's name;
- (f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing such province;
- (g) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; and
- (h) the use of the English or the French language.

No doubt there is room for discussion as to what changes might be made in the future, when the power to make changes resides in Canada. But if anyone thinks that a great rearrangement of legislative jurisdiction will be agreed upon, he is deluding himself. Quebec is alone in demanding a new Constitution. A survey of the views of the prime ministers of the other provinces, published in the *Toronto Globe and Mail* on December 31, 1966, made it abundantly clear that they are not deeply dissatisfied with the B.N.A. Act. Particularly, I cannot see Canada agreeing to any amendment of its taxing powers, while at the same time agreeing that the provinces urgently need more room to manoeuvre within their own field of direct taxation.

If and when the Constitution is rewritten, I doubt that in its essentials — that is, in the constitution of the executive authority of the various governments, and in the constitution of Parliament and the provincial Legislatures — it will be very different from the present provisions of the British North America Act.

The Distribution of Legislative Power

Some Facts and Issues

Alexander Brady

The British North America Act and Amendments

The heart of a federal system consists in a division of legislative powers between a government common and responsible to the whole country and local governments in states or provinces, which usually claim to be equal to one another under law, however unequal in size, wealth, and population. Such distribution of political responsibilities differs from the decentralization of a unitary state in that the component units are not mere creatures of the central government, subject to sudden change according to its will. They exist by virtue of an original and solemn bargain between the founders of the federation, written into the constitution and alterable only by special procedures accepted by all.

At inception every federation is historically determined by a medley of political and economic forces. It reflects the fears, hopes, anticipations, and ambitions of its creators. It is not surprising, however, that with the march of economic and social innovations the original distribution of powers in time generates dissatisfactions and tensions. In all modern federations the whirl of technical, economic, and social change has necessitated some form of periodic accommodation to new economic and social necessities. This is achieved through one or all of three ways: judicial interpretation, conventions and practice, and formal amendment.

Canadian federalism, shaped by the environment and forces of the country, illustrates in its own peculiar way these broad features of a federal regime. Its founding fathers sought a centrally oriented system to promote material progress over extensive areas. Mindful that the republic next door occupied the richer half of the continent and was more advanced in numbers and industrial techniques, they believed

that the survival of their nation beside so formidable a neighbour required the strategies and activity of a strong central government. The British North America Act was intended to achieve this end by assigning to the national Parliament defence, trade and commerce, fisheries, money, banking, interest, raising revenue by any mode of taxation, interprovincial transport and the criminal law, which in the republic had been left to the states. To Parliament it gave legislative competence "in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the provinces". In agriculture and immigration it ensured concurrent jurisdiction by national and provincial governments, but in cases of conflict the dominion enactment was paramount. The Act thus appeared to endow Parliament with the residual power that in the United States rested in state legislatures.

Further, the national executive had power to disallow any provincial statute within a year of its passage, and the Lieutenant Governors of the provinces — appointed, paid, and removable by the national authority — could reserve provincial bills for its acceptance or rejection.

This evident subordination of the provinces led some French-Canadian critics at Confederation to question the authenticity of its federalism. "How could one accept as a federation," exclaimed Antoine Dorion, "a scheme that provided for disallowance of local legislation?" In agreement with a distinguished line of American federal theorists, Dorion argued in terms that became and remain the consistent theme of Quebec provincial leaders, that genuine federalism implied two distinct levels of government, each with exclusive jurisdiction in a separate sphere and not subordinate to the other.

Despite the assignment of decisive responsibilities to the central government, the provinces were given sixteen enumerated and exclusive powers important in nineteenth century colonial life and in most cases even more important today. Among these were the management and sale of public lands, timber and mines, municipal institutions, incorporation of companies with provincial objects, public works including roads and other transport within a province, education, reformatory prisons, hospitals, asylums, charitable institutions, and property and civil rights. Social services in 1867 were not (as in the modern welfare state) intended to apply to large sectors of the public, but merely to marginal and destitute groups unable to help themselves. In the rural and pioneer society of the 1860's the family rather than the state was still the chief source of personal assistance and social security; it ministered with practical ingenuity to the individual's needs, and only in special situations expected the government to provide poor relief at the local level. On the assumption that these services would remain relatively inexpen-

sive the provinces were assigned, apart from national subsidies and fees from lands and mines, the power of levying only direct taxes within the province. Some Fathers of Confederation, including the astute financier Alexander Galt, thought that even this power would seldom need to be employed.

A conspicuous feature of Canadian federalism is its profound alteration in structure and functioning since 1867. Today it does not conform to the simple centralist concept of the Fathers. Change has occurred with only a few formal amendments to the distribution of power provided in the British North America Act, and none before the Second World War. The main changes have come through judicial interpretation, administrative and political practice, and a more intensive use of the powers originally allocated, notably in the federal tax and spending power. In 1940, with unanimous agreement of the provinces, an amendment (section 91(2) (a)) permitted Parliament to legislate on unemployment insurance, and thus achieved the first general transfer of power since the birth of the federation. It resulted directly from Canada's searing experience with extensive unemployment in the depression of the 1930's. Nine years later (1949) another amendment permitted Parliament to alter the Constitution except in certain important matters, foremost among which were the subjects assigned exclusively to the provincial Legislatures, the rights and privileges of any class of persons respecting schools, and use of the English and French languages. The national government assumed that, since the proposal was not intended to affect provincial jurisdiction, it was not obligated to secure the agreement of the provinces. But some governments, notably that of Quebec, rejected this assumption on the ground that any unilateral amendment by the national Parliament of federal institutions — for example, the Senate — concerned the provinces and thus conflicted with the spirit of the federal system. To them the generality of the language in the amendment potentially threatened their interests. Yet, despite their complaint, the proposed exclusive national power became section 91(1) of the British North America Act.

In subsequent years this amendment remained a subject of controversy.¹ In 1950, 1960-61, and 1964 federal-provincial conferences attempted to draft a procedure for amending the Constitution in Canada rather than at Westminster. In these discussions some provinces promptly emphasized that the exclusive power acquired in 1949 by the national Parliament must be modified and assimilated into the new amending procedure. But it was not until the conference of October 1964 that the

¹ Implications of the amendment were critically examined by the *Report of the Royal Commission of Inquiry on Constitutional Problems*, Quebec, 1956, Vol. 1, p. 155.

national government defined the explicit terms on which it would accept the integration of Parliament's existing power into a general amending formula, and on these terms the conference reached agreement.² After the conference, however, Quebec changed its mind and refused to ratify the amending procedure, which consequently was never implemented, and section 91(1) remained as drafted in 1949.

Two successive proposals for amendments affecting pensions were unanimously accepted by the provinces and implemented in 1951 and 1964. The first of these enabled the national Parliament to legislate on old age pensions (section 94 (a)), provided it did not affect the operation of any present or future provincial law on the subject. Thus pensions were accepted as a subject for concurrent legislation with provincial enactments protected. In 1964 the same section was amended further to include supplementary benefits, including survivors' and disability benefits irrespective of age. The significance of the special protection for provincial law was soon demonstrated when, to achieve a desirable uniformity across the country, the national government altered its Canada Pension Plan to incorporate certain features of the Quebec Plan.

Changes Through Other Imperial Statutes

The amendments mentioned above were in the actual text of the British North America Act. Since 1867, certain other imperial statutes, without changing this text, have sometimes significantly enlarged the legislative capacity of the national Parliament and provincial Legislatures, and hence also occupy a proper place in the Constitution. Often, although not invariably, they carry the title British North America Acts.³

The first of these was the Rupert's Land Act of 1868, which authorized acceptance by Canada of the rights hitherto enjoyed by the Hudson's Bay Company over western lands and provided that on an address from the Parliament in Ottawa the Crown could declare these lands a part of Canada and subject to its laws. The British North America Act, 1871, ratified the Canadian statute creating the province of Manitoba, and enabled Parliament in Ottawa to carve new provinces out of the territories, give them constitutions, alter the boundaries of the provinces with the consent of their Legislatures, and provide for the government of any

² See Guy Favreau, *The Amendment of the Constitution of Canada*, Ottawa, 1965, pp. 30-31.

³ There are other imperial acts with the same title, which are not cited here because they did not directly affect the distribution of legislative power, although they amended sections of the original British North America Act. Such were the Acts revising provincial subsidies in 1907, altering the constitution of the Senate in 1915, and extending the life of Parliament in 1916.

territory not included in a province. The British North America Act of 1886 enabled Parliament to provide representation for the territories in the Senate and House of Commons. In 1931 the Statute of Westminster enabled Parliament to make laws with extra-territorial effect, and also empowered Parliament and the provincial Legislatures, within their jurisdiction, to repeal as part of Canadian law any statute of the United Kingdom except the British North America Act.⁴

On their establishment the three prairie provinces were denied the same legislative power over their public domain and natural resources which had been granted to the older provinces on the assumption that the national authority could best employ such power in developing the country. The British North America Act of 1930 eliminated these restrictions by confirming agreements negotiated between the national government and the three provinces which granted them control over the natural resources hitherto reserved for dominion use. At the same time it returned to British Columbia the lands remaining unalienated in the Railway Belt ceded to Canada when the province entered Confederation. These changes are properly viewed as a specific reallocation of powers between the national government and the prairie provinces without altering the British North America Act of 1867.

The Expanding Activity of Governments

Since 1867 the history of amendments and statutory changes seems modest and undramatic compared with the remarkable expansion in the activities of all administrations, federal and provincial. The statute book as the instrument of legislative capacity, at both levels of government, has steadily grown in bulk. Yet, in omitting the countless ordinances of the executive, it fails to tell the whole story. Today all governments do things in ways never contemplated in 1867. From the outset the national ministry undertook to create a continental economy, to weld the country together by railways, and to foster industries by a miscellany of tariffs and bonuses. In this nation-building it was from the outset greatly helped by the acquisition of a land empire in the northwest larger in area than the original provinces. It used these vast territories to secure a trans-continental railway and to speed the colonization of the region through

⁴ The Statute of Westminster in substance really amended certain sections of the British North America Act (12, 65, and 129), although it was not formally described as doing so. See in this matter Paul Gérin-Lajoie, *Constitutional Amendment in Canada*, University of Toronto Press, Toronto, 1950, pp. 93-104.

free homesteads, both objectives being deemed essential to preserve the country from absorption in the neighbouring republic.⁵

The national government in time also extended its influence and activity outside Canada. Its role in external affairs, unlike that of the Australian government, was not provided for explicitly in the law of the Constitution but derived from the federal executive power resting mainly on custom and convention. The national ministry has directed Canada's participation in two World Wars, marshalled for this purpose the human and material potential of the country, and used its unhampered tax authority to raise the revenues needed to sustain fighting men in Europe and on the high seas.

In necessitating the wide use of national legislative and executive power, both World Wars had a profound and centralizing effect on federalism. Under the defence and emergency provisions of section 91, the government in Ottawa with sanction by the courts employed authority far beyond its reach in peace. The First World War also marked a turning-point in Canada's fiscal history. Under pressure to increase revenue for war, the national government resorted to direct taxation, thus entering a field proper to it under the Constitution but hitherto left to the provinces. Its personal and corporate income tax in 1917 was meant to be temporary, but proved too invaluable to relinquish when peace returned. Increasingly this tax became the most cherished fiscal instrument in the policies of Ottawa, feeding the federal treasury with revenue needed, among other things, to carry the burden of war debts, war pensions, and railway deficits.

The Second World War even more than the First deeply affected federalism, for it compelled the national government to impose on the economy more wide-ranging controls and raise massive funds to sustain the technology of a modern army, navy, and air force. The war also fostered major domestic developments with federal implications: it quickened industrialization, accelerated population growth, enlarged urbanism, widened acceptance of the positive state, and stimulated a potent French-Canadian nationalism.

The leaders who mobilized the nation for war were persuaded that they must also mobilize it for peace, and to this end used the immense authority they had acquired over the economy and finance. The centripetal forces in English-speaking Canada encouraged them. Here, as almost everywhere in the western world, the concept of national economic planning was then widely extolled, Keynesian ideas on contra-

⁵ For some implications of the history of these western public lands see Arthur Morton and Chester Martin, *History of Prairie Settlement and Dominion's Lands' Policy*, Macmillan, Toronto, 1938.

cyclical budgets became fashionable, and new visions of social welfare won popular acclaim. Discerning officials in Ottawa perceived that rising productivity not merely elevated standards of living but enhanced the capacity of the public to pay for new welfare services. They carefully formulated federal plans to distribute throughout the country the expected increments of income. Pressure groups of many kinds laboured for the same end.

Federal politicians saw the electoral advantages of using the national treasury to satisfy the new appetites for public services. Aware of the constitutional restrictions on what they could accomplish unilaterally, they undertook to elude them by the device of shared-cost programs and conditional grants, wherein the provinces used their own legislative powers to comply with federal conditions.⁶ The competence of the national Parliament to raise revenue by any mode of taxation was explicit in section 91(3) of the British North America Act. Aided by these expedients and powers the national leaders embarked on proliferating shared-cost programs that enabled them in effect to encroach on areas of provincial jurisdiction including natural resources, social welfare, local government, highways, and education.

To this major aggregation of power and influence in the national government the provinces presented no united front. From the outset Quebec on principle was hostile to shared-cost programs in the belief that they eroded provincial autonomy. Yet out of financial necessity and temporary expediency, it participated in many. Most other provinces, especially the poorer ones, were glad at first of the extra money and technical guidance that permitted them to begin services otherwise beyond their means. Nevertheless, by the 1950's some of the shared-cost programs began to justify criticisms earlier made by the Rowell-Sirois Commission that they involved a diffusion of administrative responsibility, expense, delays, frictions, and confusion. No less serious were their adverse effects at times on provincial policy and autonomy. The national government sometimes launched programs without adequately consulting the provinces beforehand, or consulted them only when its own position had become unalterably fixed. In either case it exerted a subtle form of coercion over the provinces in areas of their own interest and jurisdiction. Even though the expenditure that a province must make to participate in a program might distort its order of priorities, it was reluctant to reject the federal plan because its electors commonly assumed that this deprived them of something to which they were

⁶ The constitutionality of this elaborate grant system was never seriously challenged. See the brief discussion in Gerard V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, Canadian Tax Foundation, Toronto, 1967, pp. 36-41.

entitled and for which they had paid through federal taxes. Taxation without accompanying benefits was hard to defend.

From the late 1950's the variety and complexity of provincial policies and the magnitude of provincial budgets made many premiers increasingly critical of the shared-cost technique and the manner of its application. They perceived that costly projects of education, roads, hospitals, social welfare, and new forms of public works required more orderly planning than hitherto. They wanted freedom to plan according to their needs and to spend according to their priorities. They saw that the conditions of a federal program suited to one province might embarrass others. They were still glad to obtain money from Ottawa but wanted to do so on their own terms. Moreover, in some cases they had come to resent the way whereby the shared-cost plans blurred lines of jurisdiction and responsibility between the two levels of government.

Such dissatisfaction, expressed strongly by Quebec, influenced the decision of the Pearson administration in 1964 to allow provinces to withdraw from certain joint programs and receive federal tax abatements in lieu of cash grants. This concession, however, provided no satisfactory solution. Quebec alone used it. The issues of federal-provincial financial relations remained complex and contentious, and the pressure of Quebec for new constitutional arrangements failed to diminish. In November 1967 the Prime Minister of Ontario, made anxious by the drift of events, convened the Confederation of Tomorrow Conference to discuss the problems of the federation in its centennial year. On this occasion the ten provincial premiers, with the help of radio and television, gave an added impetus to the movement for constitutional review and change. In February 1968 the national government called a federal-provincial meeting wherein all governments agreed to a continuing conference, assisted by a committee of officials, to review the entire federal system including the distribution of power.

The Constitution under Review

Of central importance in any constitutional review and amendment are the attitude and aims of Quebec, which currently sets the pace for change by its sensitive response to the upsurge of French-Canadian nationalism. In the 1960's, with the threat of separatism in the background, its leaders exerted on Ottawa a powerful leverage and still assert special claims. Other provinces must consider not merely the views of the national government on the distribution of powers, but those of Quebec and their implications for the form of federation best suited to the country. They

have to understand this province's peculiarity in constitutional ideas and needs, and find a workable accommodation for it.

Since Confederation Quebec has been the traditional citadel of provincial autonomy. Irrespective of party its governments, fired by their sense of an historical mandate to preserve French-Canadian culture and institutions, have consistently opposed centralizing conceptions and policies. After 1960 they responded to a more vigorous nationalism. They wanted enlarged powers, or at least a clarification of and greater respect for existing ones. Many of their ideas were adumbrated in the Tremblay Commission Report of 1956.⁷ This detailed dissertation on Quebec's position rested on the premise that the major interest of French Canadians in federalism was their cultural survival.

Unfortunately, the Tremblay Report got scant attention in English-speaking Canada, and its philosophy and wealth of facts were not recognized for what they were, an authentic analysis of the currents of federal thought in contemporary Quebec. It expressed the now familiar emphasis on the necessity to check the erosion of federalism caused by the centralizing pressures of Ottawa, especially in finance, where the national government asserted the right to exercise an unlimited taxing power and an almost absolute spending power. In protest against these tendencies since the Second World War, the Report declared:

To believe and try to have it believed that there is respect, in Canada, for the autonomy of the provinces, because they are allowed to exist as mere administrative units to which the central authority will distribute living allowances, is mere self-deception and an attempt to deceive others. It confronts true federalism with mere administrative decentralization which is to be found in any state but which does not truly allow autonomy of the regional and local communities.⁸

It was essential to preserve genuine federalism by adhering strictly to the division of powers, permitting the provinces to play the responsible role assigned by the Constitution. The Report also advocated an interprovincial institution to achieve financial equalization among provinces, some of whom had insufficient revenues to sustain services comparable to those of their wealthy partners.⁹

The Tremblay Commission was reasonably satisfied with the general division of legislative jurisdiction in the British North America Act. It focused its main criticism on the manner whereby the national govern-

⁷ *Report of the Royal Commission of Inquiry on Constitutional Problems*, 4 vols., Quebec, 1956.

⁸ *Ibid.*, Vol. II, pp. 275-276.

⁹ *Ibid.*, Vol. III, Bk. 2, p. 297.

ment used its spending powers on social welfare and other subjects under provincial jurisdiction, and raised large funds by direct taxation, thus cramping the fiscal competence of the provinces and sapping the ethos of federalism. Such practices, the Commission believed, would ultimately result in a unitary or quasi-unitary state, and must be reversed. Provincial autonomy required more clearly defined tax fields and constant respect for them. It also required that all forms of social security should be returned to the provinces, which under a reallocation of taxes should have adequate revenues to maintain them. Measures to stabilize the economy, extend employment, and reduce fiscal inequalities necessitated the close collaboration of all governments. "Co-ordination of policies", the Commission declared, "is a requirement of the common good."¹⁰ Some existing federal institutions, such as the central Bank, should be adapted to serve the federation as a whole by permitting the provinces to sell their bonds to the Bank and appoint members to its board.¹¹

The Tremblay Commission's blueprint of the most desired type of federalism for Canada has influenced in some degree every Quebec government since the death of Maurice Duplessis. The Lesage administration in attacking shared-cost programs and requesting a fiscal equivalent for contracting-out acted in harmony with its spirit and philosophy. No less in harmony was Lesage's pursuit of policies designed to strengthen the elements of French-Canadian culture in the life of the province. The accelerating current of nationalism and reform, however, seemed to carry the Premier and his colleagues towards a wider interpretation of Quebec's position than that contemplated by the Commission. The idea of a special status for Quebec was far from being a new idea, but now in a refurbished form it came more prominently into political debate. The Premier himself did not consider special status an immediate necessity. But he once predicted that "it would be the result of an evolution, during which Quebec would want to exert powers and responsibilities which the other provinces, for reasons of their own, might prefer to leave with the Federal Government".¹² Like other provincial leaders in Quebec he sensed the fact that most English-speaking provinces were not interested in the extensive autonomy that Quebec as the unquestioned heartland of French Canada must cherish for itself.

In a period of fervid nationalism the idea of a special status, now currently much less publicized, served an evident purpose. In expressing a distinct institutional image for Quebec, it appealed to that collective pride in their cultural nationality instinctively felt by a large majority of

¹⁰ *Ibid.*, p. 203.

¹¹ *Ibid.*, pp. 300-301.

¹² Quoted in *The Telegram*, Toronto, October 14, 1965.

Quebecois. At the same time it provided an acceptable option for nationalists who otherwise might become separatists. For many English-speaking Canadians, however, a special status appeared less a bulwark of federalism than a step towards Quebec's independence. Its implications alarmed them, for they were unable to fit it into their traditional and more congenial concept of a united and single Canada where all provinces are assumed to be equal. Hence they were prompt to seize the point in Mr. Trudeau's argument that a special status for one province, if extensive in scope, would detract from the viability of the federation as a whole. The representatives sent by such a province to a national Parliament could hardly expect to have a voice equal to those of other provinces, for they would be less fully involved in the affairs of the whole federal experiment. These facts Quebec leaders must obviously face in determining the extent to which a special position for their province, already long enjoyed to some degree, can with advantage be extensively enlarged.

The victory of the Union Nationale over the Liberals in 1966 made little evident change in the kind of powers and attributes for the province that the Quebec Government sought. The style and emphasis of Daniel Johnson differed from those of Jean Lesage. He seemed more ardent in nationalism and more precise in defining Quebec's constitutional claims, but these traits reflected the qualities of his personal leadership at the time rather than any fundamental shift in the government's position. Premier Jean-Jacques Bertrand also had his own political style and speech. He was less given to Johnson's type of stark antithesis, "Equality or Independence". But his views on the Constitution appeared to be substantially those of his predecessors. An historic continuity in the policy of seeking a carefully guarded provincial autonomy as the protector of Quebec's distinct language and culture has been unbroken.

The Propositions for Constitutional Review, submitted by Quebec to the Continuing Committee of Officials preparing for the Constitutional Conference of February 1969, is an official document on what this province wants and as such commands attention, even though not necessarily intended as a final view. Actually some of its ideas had already been expressed by Daniel Johnson at a meeting of the Tax Structure Committee in September 1966. Its proposals on the distribution of power range widely, including provisions designed to increase flexibility in the Constitution by enlarging the area of concurrent jurisdiction and guaranteeing a power of legislative delegation. On these matters, especially delegation, Quebec may win support from some other provinces. At different times in the past Nova Scotia and Saskatchewan, in particular, advocated a mutual power of legislative delegation between the dominion

and a province. Their submissions evidently influenced the Rowell-Sirois Commission in recommending this power.¹³ In the Constitutional Conferences of 1960-61 and 1964, these and other provinces favoured a delegation provision mainly as a means to circumvent the inflexibility of the amending procedure. The inclusion of a legislative delegation clause would doubtless make the Constitution more flexible, but might also, if frequently employed, render it more complex and cumbersome. It could, for example, increase embarrassingly the responsibility of national government for different laws in different parts of the country. Unfortunately, little empirical evidence exists to demonstrate its unqualified worth as a federal device. The delegation clause in section 51 of the Australian constitution never bore fruit because of the difficulty in securing agreement among the different legislatures.¹⁴

In contrast to the delegation of power from one legislature to another, delegation at the administrative level is valid under the present Constitution, and in some matters has proved eminently useful. The Parliament of Canada, for example, has imposed administrative tasks on agencies created under provincial legislation, as in the Agricultural Products Marketing Act of 1949 and the Motor Vehicle Transport Act of 1954. In these cases fruitful cooperation has been achieved between the federal and provincial governments in marketing natural products and regulating motor vehicles. With the growing complexity of its economic life, Canada is likely to find more uses for this type of cooperative federalism.

The Quebec Propositions raised larger issues than delegation in the suggested transfer to the provinces of substantial powers, including all social security, social allowances, old age pensions, housing, urban renewal, family allowances, manpower placement and training, marriage and divorce. There can be little objection to the transfer of marriage and divorce from federal to provincial jurisdiction, provided explicit arrangements secure that a marriage contracted in one province is accepted in others. This type of change has no fiscal implications, and concerns a sector of social life that Quebec naturally and with good reason wants to control. More difficult for other provinces and the federal government to accept, however, is the view that all health and social welfare should become a solely provincial responsibility. For reasons of its own, Quebec desires a structure of social as well as educational policy suited to its traditions and values and considered essential for its collective personal-

¹³ *Report of the Royal Commission on Dominion-Provincial Relations*, Vol. II, pp. 72-73.

¹⁴ K. C. Wheare, *Federal Government*, 4th ed., Oxford University Press, Toronto, 1963, pp. 232-235, discussed some of the problems raised by a delegation power like that in the Australian constitution.

ity; and it sees such a policy as necessary to preserve, if not a separate state, at least a distinct French-Canadian society. It assumes, moreover, that exclusive provincial control over all forms of social aid and security would be administratively more efficient, since all these matters are interdependent, and management under a single government permits better planning, closer integration of programs, and avoidance of a wasteful overlap at present too often evident.

In the circumstances and social climate of Quebec, this argument has undeniable force. In the past a focal point in the French-Canadian community was the fecund family, whose traditional forms are now threatened by urbanization, the progress of secularism, a shrinking birth rate, high unemployment, and generally the ideas and environment of an industrial civilization. Those responsible for social policy in the province see an urgent need to buttress the family as basic to the survival and stability of the society and hence consider essential a careful coordination under a single government of many welfare and economic schemes — notably family allowance, unemployment insurance, and social assistance and security.

In the area of policy the English-speaking provinces lack Quebec's cultural ambitions and special anxieties. They live in a different social atmosphere, share a like if somewhat ill-defined concept of nationhood, view Canada as a single community, and are more partial to a common framework of welfare services throughout the country achieved, not through the federal government alone, but through effective cooperation among all governments. The lower income provinces, for evident reasons, are the most eager to enlist the leadership and assistance of the national government, being less able to maintain adequate social standards alone. At the Confederation of Tomorrow Conference Mr. Smallwood asked: Has a baby born in a Newfoundland outport the same prospects for a good Canadian life as one born elsewhere in the country? If not, why not? Mr. Robarts replied that being a Canadian should have the same meaning regardless of the province where an individual resides, although he admitted the impossibility of achieving a precise equality in opportunity or service for all regions. He said on behalf of Ontario that "we accept completely our responsibility to share in the totality of Canada because what we have is not all ours nor does it come purely from our efforts in this province".¹⁵

This candid recognition of their interdependence, with its implication that the more fortunate must help the less fortunate, explains why the Anglophone provinces have usually been ready, if properly consulted

¹⁵ *Confederation of Tomorrow Conference*, p. 131.

beforehand, to cooperate with the national government in welfare plans. It also explains why they have taken for granted a variety of transfer payments. Mitchell Sharp once described equalization arrangements as one of the dividends of Canadian unity. It may be argued that they also contribute to such unity, although on this point Mr. Bennett in British Columbia has often expressed dissent. Dissatisfaction with the federation in some English-speaking provinces and regions has been lessened by raising the level of public services and amenities available to all despite disparities in income. It does not follow, however, that an extended equalization necessarily means sound national economics. There is frank and wholesome realism in the comment of the Ontario Committee on Taxation that "equalization involves economic costs as well as benefits. Equalization payments in detracting from the ability of a rich province to provide additional services without increased tax burdens adversely affect productivity and growth not only regionally but nationally."¹⁶ It is in the public interest to make known the economic costs of federal policies even when these are advocated for Canada's unity and survival.

Today the provinces have reason to be pragmatic in attitudes to public health and welfare and to collaborate as closely as possible. They know that implementing these policies is costly and likely to become more so. They see that over one-half of all public spending now goes to health, welfare, and education compared with less than 30 per cent in 1952.¹⁷ They are anxious to discover how welfare and social security can be efficiently administered and financed within a complex industrial society undergoing profound change, and how they are best integrated with other forms of public control, such as income taxation. In view of the speed and unpredictability of technical change, the growing magnitude of the welfare budget, and the changing concepts of welfare, answers to jurisdictional and administrative questions must often be tentative. Yet some general considerations affect what may be desirable. Since the provinces are accountable for instituting and supervising all facets of local government, they can appropriately shoulder responsibility for those services that require adjustment to local diversities and experience, such as hospitals, public health clinics, and agencies providing social assistance. When, on the other hand, uniform schemes on a broad financial basis are both advantageous and possible, as hitherto in unemployment insurance, the national government may properly carry responsibility, unify payments and benefits throughout the country, and help to ensure mobility of labour as an integral element in Canadian nationhood. Fiscal

¹⁶ *Report of the Ontario Committee on Taxation*, Vol. I, Queen's Printer, Toronto, 1967, p. 37, para. 50.

¹⁷ *Tax Structure Committee Report*, 1970, para. 19.

and financial arrangements in the long run should be adjusted to what seems the most logical administrative division of such services. At the same time in this large and expensive area of activity, constant consultation and cooperation between the two levels of government are essential as well as a readiness to review and alter programs as circumstances dictate. Modern industrialism continues to transform public attitudes, values, and technology, and such transformations impinge on the social policy of provinces and federal government. In this situation scope for flexibility in administrative arrangements is an invaluable asset.

A perennial source of contention in contemporary federal-provincial relations is the disequilibrium between legislative power and financial capacity. The power to legislate implies a responsibility to provide services, which in turn implies revenues adequate to sustain their maintenance and growth. In recent years the united chorus of complaint in all provinces has been the deficiency of revenues to meet mounting demands for services. To consider the distribution of power without the inclusion of this factor is to discuss Hamlet without the Prince of Denmark. The constitutional conference in 1969 wisely assigned it a top priority.¹⁸

The imbalance between power and revenue is not new. It came with Confederation, and was conspicuous in the 1930's when the Rowell-Sirois Commission was intended to set it right. Since the Second World War and especially since the 1950's, it has been rendered more acute by the interplay of new economic and social forces. As already suggested, the war and its aftermath quickened a growth in industrialization, which in turn speeded the inflow of immigrants, accentuated the aggregation of people in urban areas, and stimulated the public appetite for provincial and municipal services of every kind, especially education at all levels, hospitals and other public health facilities, highways for the seemingly endless stream of motor vehicles, and water and sewage works. These manifestations of economic growth and rising expectations have meant a drastic shift in the relative expenditures of the national and provincial governments. Mr. Trudeau has reminded the House of Commons that in the decade 1954-1964 federal expenditures increased 56 per cent, whereas those of provinces and municipalities increased 204 per cent.¹⁹ The reasons are clear. The provinces are now responsible for

¹⁸ Aside from a general statement of policy in *Federalism for the Future*, Ottawa, 1968, the national government issued two working papers: *The Taxing Power and the Constitution of Canada*, 1969 and *Federal-Provincial Grants and the Spending Power of Parliament*, 1969.

¹⁹ *House of Commons Debates*, January 26, 1970, p. 2812. More information on this matter is contained in the *Tax Structure Committee Report*, 1970. Thus in para. 29, it is pointed out that the provincial-municipal share of final expenditures has risen from 35 per cent in 1952 to almost 60 per cent today. By 1971 this share would account for a forecast 63 per cent of all public final expenditure.

some of the most costly functions of peacetime government. Their legislative powers remain the same, but they are compelled to use them more abundantly and in ways that involve extensive spending.

With accelerating expenditures the provinces had to exert themselves to augment revenues. Aside from heavy borrowings they proceeded in two ways: they resorted to new forms of taxing or more intensively used old forms; and they extracted whatever help they could from the national treasury in conditional or unconditional grants, even though the former might jeopardize their strict autonomy. In the first case they began to utilize more fully than hitherto their substantial capacity to tax under the British North America Act. As noted earlier this Act granted the national Parliament an unlimited power to tax across the country and permitted provincial Legislatures to levy direct taxation within the province for provincial purposes, but not so as to create barriers to interprovincial trade. Owing to a liberal interpretation of the term "direct taxation", the provincial fiscal power within its own domain is almost as wide as that of the national Parliament. It can resort and has resorted to a variety of taxes, such as those on personal incomes, corporations, property real and personal, succession of property, public utilities, motor vehicles, general sales, alcoholic beverages, tobacco, gasoline, fuel oil, and amusements. Increasingly the provinces have favoured the personal income tax owing to its proved potentiality for rapid growth in revenues and its more than automatic response to inflation. Understandably they urge the federal government to vacate in their favour more of this fertile fiscal field, especially under the current favourable circumstance whereby the tax is collected in Ottawa free of charge. In 1952 personal income taxes accounted for about 20 per cent of all public revenues and more than 26 per cent of federal revenues. By 1971, it is estimated, the income tax will account for 33 per cent of all revenues, 25 per cent of provincial net revenues, and as much as 45 per cent of revenues going to the national treasury.²⁰

Joint occupation by the two levels of government of substantially the same tax fields (customs duties and property taxes excepted) has, therefore, become an established feature of Canadian federalism, and in the current discussions the national government thinks it should, with few exceptions, remain so.²¹ This view is also in general advocated by Quebec, Ontario, and other provinces, but rejected by British Columbia, which would reallocate tax sources by having the federal authority withdraw from the taxation of personal and corporate income and estates.

²⁰ *Tax Structure Committee Report*, 1970, para. 12.

²¹ *The Taxing Powers and the Constitution of Canada*, p. 8, and *Federalism for the Future*, pp. 40-42.

There are some obvious advantages in allowing the two levels of government free access to almost the same range of tax resources for use in the way best suited to their circumstances. Flexibility is thus retained and neither level of government is placed in a fiscal strait-jacket. Yet in an age of almost galloping collectivism and heavy public levies on income, consumption, and wealth, the joint occupancy principle must, in order to produce the best public results, be accompanied by intimate collaboration between the provincial and federal governments on the use of the tax power. The interests of Canadians cannot be served by uncoordinated competition among tax collectors. The case for collaboration in the interests of economic efficiency was lucidly put in 1967 by the Ontario Committee on Taxation, which emphasized the importance of uniform standards of legislation in jointly occupied fields, common federal-provincial collection agencies, and interprovincial tax agreements.²²

In submissions to the Constitutional Conference both Quebec and Ontario stressed the necessity for close cooperation between the federal and provincial governments in all fiscal and financial policies. Quebec proposed permanent constitutional machinery, which, aside from annual conferences for the political heads of the different administrations, should include a Standing Intergovernmental Commission on Taxation to prepare tax plans for set periods and assess present and future tax resources. On somewhat similar lines Ontario recommends a ministerial committee, representative of all governments and responsible for coordinating the whole range of economic and fiscal policies, supported by a body of senior civil servants and a permanent federal-provincial secretariat.²³ In addition Ontario proposes a federal-provincial commission to deal with such operational aspects of tax administration as supervising tax development and practices and administering specific federal-provincial collection agreements. It hardly needs to be added that these provinces assume that genuine cooperative arrangements would allow them some voice in determining the tax base and prescribing a stabilization policy. At present when the provinces want more revenue from income tax, they are restricted to rate increases, whereas the national authority can alter both the base and the progressivity of the rate structure.

The national government in its papers on *Federalism for the Future* and the *Taxing Powers and the Constitution of Canada* has admitted the necessity to harmonize federal and provincial spending and taxing policies without, however, defining how far it is prepared to go. But it

²² *Report of the Ontario Committee on Taxation, op. cit.*, Vol. I, pp. 32-34.

²³ *Intergovernmental Finance and Ontario's White Paper on Provincial-Municipal Taxation Reform*, submitted to the Constitutional Conference in 1969.

assumes an obligation for bringing this idea to greater and belated fruition. Hitherto, directly and indirectly, it has exerted a decisive command over fiscal policy and jealously avoided cooperative institutions that threatened to impair its freedom to manoeuvre and its own indisputable position of responsibility. Towards the provinces it has never fully overcome a paternal attitude, fostered by the circumstances in which Confederation was born and early nurtured and reinforced in the twentieth century by the harsh facts of war and depression. Now, in a different era, it faces the opportunity to transform its role from that of a stern, if benevolent, headmaster into a senior and understanding partner, who endeavours to see the national interest not merely from the special angle of Ottawa, but from that of the provincial capitals across the country. To make cooperation a reality it must sacrifice some freedom of action, but the weighty collective benefits for the federation and the federal principle would justify the sacrifice.

The procedures necessary for better cooperation are carefully examined in a report entitled *Intergovernmental Liaison on Fiscal and Economic Matters*, prepared by the Institute of Intergovernmental Relations at Queen's University.²⁴ The Report remarks, "So far in our history we have developed an extensive and somewhat formless maze of relationships between governments to meet the needs of the co-ordination of their interests and responsibilities." It suggests ways to achieve more coherence and especially to secure the kind of continuous consultation needed between governments if they are to coordinate their objectives and priorities. Cooperation in the difficult marriage between parliamentary government and federalism is admittedly easier to recommend than to achieve. Yet clearly the time has come to master its difficulties. It must not only be vertical, between Ottawa and the provinces, but also at times horizontal, among the provinces themselves.

Aside from the revenue derived from their own taxes and certain other receipts, the provinces obtain from the national treasury a variety of unconditional and conditional grants. The unconditional, which now cause few serious problems, originated with Confederation, and today are the principal means for assisting provinces that suffer from low fiscal capacity and inability to maintain public services on modern lines without having to impose higher than average tax burdens. These grants are particularly valued by provinces such as Newfoundland and Prince Edward Island, which receive more than half their revenues directly from Ottawa in the form of equalization and other unconditional grants, and hence not surprisingly often seem complacent allies of the national government.

²⁴ Queen's Printer, Ottawa, 1968.

Conditional grants of the shared-cost type have significantly extended economic and social policies acceptable to Parliament and the provincial Legislatures. Although they represent joint efforts by the two levels of government to achieve common ends, they exist mainly in virtue of one signal fact: the massive spending capacity of the national Parliament, which since the Second World War has become one of the most pervasive and influential powers in the Constitution. As the national government's working paper has pointed out, the spending power in this context has a special meaning: it is a power of Parliament to make payments to people, institutions, and governments for purposes on which it may lack any competence to legislate.²⁵ It is distinct from the regulative power. Parliament cannot under the Constitution establish or regulate hospitals, but through grants to the provinces can help to sustain them.

Although the exercise of this power in shared-cost programs has substantially furthered certain common standards in the country's economic and social development, it has at the same time augmented the complexity and acute tensions in the federal system. It has sometimes, in truth, brought the equity of federal political practice into question. Quebec, as already illustrated, has been the most constant and sharpest critic of shared-cost programs. The views of the Anglophone provinces on this matter differ with their circumstances. Those with low incomes, like the Atlantic provinces, are usually partial to these programs and the spending power of the national Parliament which makes them possible.

The programs have incurred increased criticism from other provinces. The Tax Structure Committee has summarized the chief complaints.

They intrude on areas of provincial jurisdiction and unduly interfere with provincial priorities and timing; they have an inappropriate influence on provincial program policies and administration; unilateral federal action in terminating programs or placing annual ceilings on expenditures may penalize certain provinces and create uncertainties for provinces in program planning and budget preparation; when programs are terminated and moneys remain unspent, the result is that provinces are denied their unspent allocations, or are required to undertake undesirable acceleration in expenditures; complicated administrative procedures are required; and all legitimate costs are not recognized as eligible for sharing.²⁶

²⁵ *Federal-Provincial Grants and the Spending Power of Parliament*, para. 2. The basis of the power is contained in sections 91(1) (a) and 91(3) of the *British North America Act*.

²⁶ *Tax Structure Committee Report*, 1970, para. 66.

The national government has not been stone deaf to such provincial criticism and some of its Ministers have been worried by the total dimensions of the shared-cost programs in the contemporary federation. In 1965 their concern was concretely expressed in the Established Programs (Interim Arrangements) Act, which allowed those provinces that assumed full financial responsibility for certain joint programs abatements under the income tax, equalization payments, and — whenever applicable — adjustment payments or cash compensations. Walter Gordon, then Minister of Finance, described the Interim Arrangements Bill “as a prelude to a thoroughgoing review of the role of shared-cost programs” to be carried out by the Tax Structure Committee.²⁷

In explaining the Bill the Minister of Finance mentioned circumstances that influenced him and his colleagues in concluding that a reassessment of the system was timely. Since 1945 the funds transferred under the programs had grown twenty-fold, from \$50 million per annum to \$903 million. In the interval equalization grants had developed to help strengthen the fiscal capacity of certain provinces, whose weakness at the outset had provided one reason for rapidly extending conditional grants. Since many basic services were now established, it was opportune to consider whether the provinces should not become responsible for those services within their own jurisdiction, a view reinforced if not wholly inspired by the persistent arguments of Premier Jean Lesage. At any rate we find Mr. Gordon quoting with approval an old dictum of Laurier that “it is a sound principle of finance and a still sounder principle of government that those who have the duty of expending the revenue of a country should also be saddled with the responsibility of levying and providing it”.

Quebec alone was prompt to accept the offer in the new enactment. The failure of other provinces to respond in like fashion is not attributable to doctrinaire devotion to the shared-cost principle or even to the merits of existing programs. They were disposed to view the transfer simply in the light of whether it would lessen their present and future financial burdens, and had no difficulty in concluding it would not; indeed it might increase them. Some provinces considered unsatisfactory certain financial and other aspects of the programs, especially their inflexibility. They were unwilling to be solely responsible for something both unpromising and unalterable under the terms of the transfer. They had no wish to tie their hands by such a commitment.

Mr. Robarts on behalf of Ontario remarked:

²⁷ *House of Commons Debates*, December 18, 1964, p. 11337.

The implicit equalization hidden in some shared-cost programs should be evaluated and removed. The equalization component in such programs as hospital insurance arises because the present sharing formula does not adequately account for interprovincial differences in costs. That is, each province receives part or all of the federal assistance on the basis of national costs, while actual costs in different provinces vary from well above to well below the national average. The result of this procedure is a federal overpayment to provinces in which costs are relatively low and a penalty to provinces in which costs are high. These differences are not compensated for in the federal transfers. In addition, cost-sharing formulae based on national average costs can actually operate as a deterrent to the improvement of standards in some provinces.²⁸

Ontario was unwilling to accept any transfer of existing shared-cost programs before exploring further such matters as tax sharing and equalization.

More far-reaching consequences for the spending power are involved in the proposal of the federal government submitted to the Constitutional Conference of June 1969. This was intended to meet a prevalent and legitimate criticism that, through its expenditures, the federal government had created a vast structure of shared-cost programs in areas of exclusive provincial jurisdiction without adequately consulting, or receiving the consent of, the provinces. In a nutshell the proposal is that no programs of this kind should be financed by Parliament unless two conditions are satisfied: the existence of a national consensus in their favour, determined by a procedure under the Constitution; the protection of the people against fiscal penalties in a province whose Legislature, despite the national consensus, rejects a program.

In the light of the federation's experience since the Second World War, the suggested constitutional restraint on Parliament's spending power is sound in principle. It would help to remedy a manifest and growing source of friction and disharmony in federal-provincial relations. Every federal constitution tries to define and protect the jurisdiction of the participating provinces or states. In Canada the federal spending power in the last twenty-five years has sometimes exercised an undermining influence on the provinces' freedom of manoeuvre and capacity to frame policy according to their own sense of priorities and need. Nothing short of a constitutional restraint is likely to make federal-provincial consultation effective at the initiating stage of shared-cost programs. A federal government with money to spend always finds convincing political reasons to push rapidly ahead with a program at the expense of adequate provincial consultation. A constitutional restraint

²⁸ *Report of Federal-Provincial Tax Structure Committee*, Ottawa, 1966, p. 40.

on the spending power would compel such a government to take consultation more seriously. It would guarantee to the provinces a stronger voice in determining those programs that affect their jurisdictions and interests.

Two perceptive authorities on Canadian federalism fear that the national government's proposal would introduce to the Constitution an undesirable rigidity.²⁹ But no federalism exists or survives without constitutional rigidity. It is implicit in any distribution of powers, and in the present proposal all that Ottawa attempts is merely to define conditions hitherto undefined whereby one of its financial powers is exercised. Under its plan it still retains a large part of its spending power unrestricted, such as the unconditional grants to provinces and the payments to persons and institutions. In some situations a restraint on the federal spending power might actually prove no less advantageous to Ottawa than to the provinces, protecting it from rash ventures under the powerful pressures of the moment.

The federal proposal in principle is wise, but the procedures for its implementation, although ingenious, leave something to be desired. It requires that the four territorial divisions of the present Senate (Ontario, Quebec, the Maritime provinces and Newfoundland, and the western provinces) be taken as operative units. A national consensus for a program would be secured when five provincial Legislatures in three of the senatorial divisions approve. In the Atlantic region any two Legislatures in Nova Scotia, New Brunswick, and Newfoundland must agree, and in the western region any two of four Legislatures. Since no minimum population is required, a so-called national consensus might thus under some circumstances be reached by the assent of five out of ten provincial Legislatures, representing a minority of the people in the country — surely a somewhat strange sort of national consensus. It would seem essential that whatever formula is adopted the assenting provinces and regions should represent at least 51 per cent, and preferably 55 or 60 per cent of the population.

Hardly less desirable than the basis for a national consensus is the provision that in provinces whose Legislatures voted against the proposal, the people would be given grants in the aggregate equivalent to the average per capita amount paid the participating provinces multiplied by the population of those not participating. The federal working paper claims that such direct payments to the people would meet the "taxation without benefit" argument. It may do so in part, but it neglects a major

²⁹ Donald V. Smiley and Ronald M. Burns, "Canadian Federalism and the Spending Power, Is Constitutional Restriction Necessary?" *Canadian Tax Journal*, Vol. XVII, November to December, 1969, pp. 468-482.

reality in the whole controversy over conditional grants — namely, that sometimes these ignored and hence complicated the spending plans and obligations of provincial governments. The governments should receive the payments in order to extend other programs important to them. If the federal money goes directly to the citizens, it helps no public service of any kind, unless it is considered an unsatisfactory mode of income redistribution.

In conclusion it is appropriate to re-emphasize the central fact that with the growing interdependence between all parts of the national economy, provincial and regional, every decision of a single government involving major expenditures has implications for the others. The division of powers must be seen in this light. Fresh ideas on the arts and forms of collaboration will need to be constantly explored and applied, and the thinking of political leaders constantly adapted to the inescapable circumstance of economic and technical change. Adjustments in the distribution of power will best be derived from experience gathered in the process of cooperation. An eminent official in Ottawa remarked in 1967 that

... the federal power has been used, knowingly and intentionally, to alter provincial priorities. It has sometimes been used, too, unknowingly and unintentionally, in such a way as to affect the very administration of provincial programs. Similarly the provinces, or certain of them, have sought by hard political pressure and negotiation to lay claim to jurisdiction long accepted as being federal.³⁰

These incessant rivalries and tensions, increased by the growth of collectivism, will not entirely be eliminated by consultative and collaborative machinery, but at least should be reduced to a level beneficial to Confederation and the public welfare of Canada.

³⁰ A. W. Johnson, "The Dynamics of Federalism in Canada", *Canadian Journal of Political Science*, Vol. I, March 1968, p. 24.

Canadian Federalism: Foreign Affairs and Treaty Power

The Impact of Quebec's "Quiet Revolution"*

Edward McWhinney

Foreword

When I first wrote the succeeding essay, some people asked me: Why join to an analysis in depth of a technical legal subject, namely the ambit and limits of the federal government's foreign affairs power under the Canadian Constitution, discussion of other constitutional issues like the respective federal and provincial competences as to the off-shore mineral and oil deposits; the federal and the provincial elements involved in the community decision-making as to choice of the site for a new international airport in one of the provinces; even the legal power of a federal Cabinet Minister, here the federal Prime Minister himself, to pressure foreign diplomats accredited to Canada not to attend a provincially and municipally permitted mixed social-political celebration? My answer had to be that no one constitutional problem, however specialized, could be considered in isolation from other constitutional problems arising at the same time, for they are usually mutually interacting; and that the general political climate against which one problem is resolved, tends to condition and control the solution of the other problems.

There is an intriguing story — part of the Canadian constitutional folk-lore of our times — that Quebec's current involvement in a foreign affairs power conflict with the federal government stemmed originally from Premier Jean Lesage's political humiliation over the failure of the Fulton-Favreau formula for a "repatriated" constitutional amending machinery for the Canadian federal constitution. Premier Lesage, as the Quebec provincial Liberal Party leader, had fought hard and loyally, and

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rather against his own best political interests in the Province of Quebec, to secure Quebec's adoption of the federal Liberal government's constitutional proposal. When Prime Minister Pearson and his Cabinet started to "waffle" politically on the Fulton-Favreau formula, as a result of some criticisms in English-speaking Canada that it represented a political sell-out to Quebec and French Canada, Premier Lesage found the rug pulled out from under his feet; and the measure was rejected in the then-existing Quebec upper house, on the score (ironically) that it represented a political sell-out by Quebec to English-speaking Canada. The political folk-lore then asserts that Premier Lesage, as a political diversion to cover his provincial Liberal Party government's discomfiture at its summary desertion by the federal Liberal Party government, gave the green light to the study and development of a special role for the province, and indeed all provinces, in the making and concrete application of Canadian foreign policy.

As it happens, a brilliant young group of academics associated with the Université de Montréal — among these Jacques-Yvan Morin, Jacques Brossard, and André Patry — had been exploring the logical implications of the *Labour Conventions* decision of 1937, as part of their continuing studies of the possibilities of a "special constitutional status" for Quebec. The latter concept had originally been conceived in Quebec intellectual circles, as a method of reconciling ultra-nationalist, sometimes separatist-leaning, Quebec constitutional thinking with the principle of maintenance of Quebec within the Canadian federal system. Paul Gérin-Lajoie, the then Quebec Education Minister, perhaps the foremost constitutional theorist among the present generation of French-Canadian political leaders, thereupon proceeded to elaborate the theoretical underpinnings of the new constitutional concept, and to try to integrate it into his own more general, pluralistically inclined, philosophy of federalism.

When the matter was officially taken up by Quebec at the federal level, it quickly became apparent that the federal response reflected an uneasy balance between the "hawks" and the "doves" in the federal government. The "doves" won, temporarily at least, when the highly imaginative and essentially pragmatic "umbrella formula" — which reflected, also, the empirical reality of the countless transnational dealings and transnational transactions by all of the main provinces (English-speaking provinces, above all), over the years, without any emotional conflicts or battles with Ottawa — was sponsored by the then federal Minister for External Affairs, Paul Martin, in 1965, and cheerfully accepted by the Lesage government in Quebec.

Thereafter, we can observe a sort of continuing see-saw effect, depending upon whether the "hawks" or the "doves" are prevailing, at the

particular moment, in either Ottawa or Quebec City, or in both. An overly rigid, abstract, essentially symbols-oriented ploy, by either Ottawa or Quebec City, has tended to produce an equal and contrary reaction on the other side, in which there has been a certain wilful emphasis on mutual frustration, rather than on the pragmatic and empirical accommodation of federal and provincial interests in an area of common concern.

Sometimes the process of mutual recrimination, and of escalation from the trifling or inconsequential to exercises in political "brinkmanship" and confrontation at the summit, has been assisted by seemingly perverse decision-making in other areas, not directly related to foreign affairs. It is difficult, in this regard, to think of a more casually unscientific approach to decision-making in a domain of great technological and economic complexity urgently requiring full federal and provincial consultation and continuing cooperation, than the federal government's recent unilateral *ukase* as to the choice of the site for the new Montreal international airport.

Sometimes, again, the mutual mistrust, and the tendency to expect the worst and so to try to provide against all sorts of imaginary evils for the future, has produced what seem, in retrospect, like morbidly suspicious responses. Thus, the original draft article on "Capacity of States to conclude Treaties", contained in the general Draft Convention on the Law of Treaties prepared by the U.N.'s International Law Commission in 1966, contained the following provision:—

Art. 5 (2): States of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down. . . .

Such a provision, as its terms make clear, could confer no more power, at international law, on the member-provinces of a federal system than they happened to possess under their own, internal, federal constitutional law, whatever that might be: the provision might, indeed, be called an international law pleonasm, or statement of the legally obvious. Nevertheless, vigorous lobbying by the federal government helped to secure its deletion, altogether, from the final Article on "Capacity of States to conclude Treaties" (Article 6) contained in the Vienna Convention on the Law of Treaties adopted by the U.N. Conference on the Law of Treaties on May 22, 1969. (The original political pressure to include Article 5(2) seems to have stemmed from the Russians, in response to special conditions of federalism within the Soviet Union. There is a case, of course, on purely technical, non-political grounds, for arguing that legal pleonasms have no place in international conventions.)

The federal-provincial disagreements over the foreign affairs power had seemed close to settlement, on a highly pragmatic and essentially reasonable basis, in the early summer of 1969, with the elements of commonsense and mutual cooperation being emphasized at the federal level by External Affairs Minister Mitchell Sharp, and in Quebec by Premier Jean-Jacques Bertrand. The subsequent degeneration, over the late summer of 1969, into a veritable "guerre des boutons" is recorded in the succeeding historical documentation of the *de Lipkowski* affair, given on a more or less blow-by-blow basis. The *de Lipkowski* affair itself seems to have stemmed from political events beyond the immediate control either of the professional Foreign Ministers in Ottawa or in Paris, or of the Quebec Premier. But the descent into the trivial or farcical or the purely ill-mannered, without any corresponding apparent political or social advantage, that the *de Lipkowski* affair involved, seems to have brought with it its own beneficial reaction. The *de Lipkowski* affair now seemed to end as suddenly as it had begun, with a new emphasis on pragmatic accommodation between the three parties — Ottawa, Quebec, and Paris; and with a new recognition of the merits of cooperative federalism, as between Ottawa and Quebec. The new trend to reasonableness and mutual give and take continued, notwithstanding some further skirmishes immediately preceding the Quebec election of April 29, 1970. The new Quebec Premier, Mr. Bourassa, in his campaign, gave first priority to economic issues in preference to governmental "symbols"; and he is thus in a position to bring the trend to its logical conclusion. In that case the Ottawa-Quebec-Paris "guerre des boutons" may conceivably already have receded into history, though the underlying issues that gave rise to it, concerning the essential nature and character of Canadian federalism, continue of course. The one may be called the "folklore" of Canadian federalism — in Marxist terms merely the legal superstructure; the other is the infra-structure of concrete economic and social facts and the tensions and conflicts stemming from them.

The succeeding discussion looks at some of the concrete record of governmental practice (whether provincial or federal) in Canada, under the impact of the "Quiet Revolution" in Quebec, in important areas of foreign affairs and transnational cultural, social, and commercial relations generally. Its thesis will be, first, that at the level of constitutional law-in-action, important changes and modifications are occurring in Canada which largely render out of date certain traditional, *a priori* concepts and attitudes as to intergovernmental relations within a federal system; second, that these *de facto* changes, which are already ripening, through sustained practice and observance, into Conventional constitu-

tional law, tend to present the Privy Council's work on the Canadian Constitution and its interpretation in a new and rather more favourable light (in comparison perhaps to the record of the Canadian Supreme Court); and third, that the constitutional changes that have, in fact, occurred in this area, make good sense in pragmatic, experiential terms, having regard to the inner dynamics of Canadian federalism today and to the aspirations of the main contending power groups, the new positive law of the constitution thus coming very close to being also community "living law" in Canada.

***Labour Conventions*¹ 1937, Revisited**

The Privy Council, ignominiously consigned into the limbo of history as far as Canada was concerned, with the abolition of the appeal to it from Canadian courts in 1949, has for long been the favourite *bête noire* of English-Canadian law professors on account of its generally centrifugally oriented, decentralizing, pluralistic philosophy of federalism, as manifested in its opinions on the federal-provincial conflicts under the Canadian Constitution. Its opinion in the *Labour Conventions* case in 1937 has been perhaps the most bitterly assailed and certainly the most often ridiculed judicial opinion in Canadian constitutional history. Right from the outset, the English-language critics attained a standard of hyperbole in their attacks on the *Labour Conventions* rationale: it was, according to these critics, a "disaster" for Canadian federalism; it would make the conduct of a rational Canadian foreign policy for the future quite impossible.

The *Labour Conventions* opinion was further weakened, in its psychological authority at least, by Lord Wright's latter-day publicly expressed doubts and misgivings as to the policy merits of its rationale, in shaping which, of course, Lord Wright had himself participated as a member of the Board of the Privy Council actually sitting on the case.² Worse was still to come with the irreverent speculation as to the internal divisions within the five-man Board of the Privy Council sitting in the case and the suggestion that the deciding vote, among the five judges in the case, must have been cast by a "taxation judge" who "sat throughout the 1937 hearings in his overcoat making neither note nor comment"³

¹ *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.).

² See the comments by Lord Wright, in connection with his posthumous tribute to Chief Justice Sir Lyman Duff, published in 33 *Canadian Bar Review* 1123, at 1125 et seq. (1955).

³ See the comments of MacKinnon, in *Labour Conventions Case: Lord Wright's Undisclosed Dissent?*, 34 *Canadian Bar Review* 115, at 117 (1956). And see, also, Scott, *ibid.*, 114; McWhinney, *ibid.*, 243.

and presumably absolutely indifferent to counsel's argument and to the proceedings around him. It was at this stage, in the middle 1950's, that Chief Justice Kerwin of the Canadian Supreme Court, a notoriously cautious judge who always affirmed a philosophy of judicial non-involvement — "in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary"⁴ — was moved to indicate that he might like to overrule the *Labour Conventions* case if he should ever get the opportunity to do so.⁵

Looking back, it is impossible not to smile at all this thunder and fury and exaggeration from earlier years. Not merely has the *Labour Conventions* decision *not* rendered impossible the conduct of a rational Canadian foreign policy. In fact, no single example has ever been cited, in the years since 1937 when the *Labour Conventions* decision was first handed down, where its rationale has presented any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations. At the concrete, empirical level, it has in fact proved easily possible for Canadians to live with the *Labour Conventions* decision; and so the purely abstract, *a priori*, prophecies of constitutional doom and gloom, launched by the critics of the late 1930's, have been amply dispelled by the historical record of events since that time. This part of Canadian constitutional history, at least, is surely a warning to legal pundits in general, and to law professors in particular, against the temptations of trying too much to play Cassandra.

It remains only to note that the popularity that the *Labour Conventions* decision enjoys today, in the Province of Quebec, in recognition of the Privy Council's respect for the provincial jurisdictions established in section 92 the B.N.A. Act, against ever-expansionist federal legislative pretensions under the rubric of the federal foreign affairs power, is paralleled, in measure, in the decision of the final appellate tribunal of another major, "classical", federal system, on an essentially identical fact situation. Having before it the twin examples of the United States Supreme Court in the "Migratory Birds" case in 1920⁶ (in favour of an expansionist, preemptive federal foreign affairs power), and of the Privy Council in *Labour Conventions* (in favour of preserving the spirit and the letter of the constitutional allocation and division of federal and provincial legislative competences, against federal foreign affairs power claims), the Federal Constitutional Court (*Bundesverfassungsgericht*) of West Germany opted for the *Canadian*, and not the American, constitu-

⁴ Per Kerwin C.J.C., *Switzman v. Elbling*, 7 D.L.R. (2d) 337, 341 (1957).

⁵ See per Kerwin C.J.C., *Francis v. The Queen*, 3 D.L.R. (2d) 641 (1956).

⁶ *Missouri v. Holland*, 252 U.S. 416 (1920).

tional example.⁷ The German Court reasoned that the essence of federalism is, in fact, the maintaining of a balance or equilibrium between federal and provincial (*Land*) power, and that considerations of pluralistic liberalism (especially strong in postwar German judicial philosophy in reaction to the excessive centralization of governmental authority in the preceding, Nazi era) demanded judicial respect and deference for the constitutional grant of law-making authority to the provinces (*Länder*).⁸

The Confusion Between Treaty-making and Treaty-implementation

The *ratio decidendi* of *Labour Conventions*, as rendered by the Privy Council in 1937, concerns treaty-*implementation* — the legislative implementation, whether by the federal government or by the provincial governments respectively, or by both jointly, in statutory form, of the substantive legal obligations, if any, contained in the treaty. The Privy Council's opinion says nothing about treaty-*making* as such — that is to say, about the legal competence actually to enter into or to make "treaties", whatever that word may be defined to include.

Leaving to one side, for the moment, the constitutional and international law connotations of the word "treaty", it may well be correct to assert, as does the first federal White Paper, *Federalism and International Relations* issued in 1968, that Chief Justice Duff (with Justices Davis and Kerwin with him in his opinion) concluded that "Canada had the power to enter into agreements on matters falling within the provincial legislative competence";⁹ though in fact Chief Justice Duff's language is a little more vague and general, and unpolarized, than that. However, it is surely, at the very least, a *non-sequitur* to escalate happily from that statement, as the second federal White Paper, *Federalism and International Conferences on Education*, also issued in 1968, does, to the bold affirmative proposition:

... The judges of the Supreme Court of Canada explicitly recognised that the Canadian Government could enter into treaties on all subjects, and the Judicial Committee of the Privy Council,

⁷ Decision of Federal Constitutional Court, (Second Senate), March 26, 1957. 6 B. Verf. GE 309 (1957).

⁸ See the discussion, by the present writer, in *Federal Constitutional Law and the Treaty-making Power — German-Vatican Concordat of 1933 — Decision of West German Federal Constitutional Court*. 35 *Canadian Bar Review* 842 (1957); *Constitutionalism in Germany and the Federal Constitutional Court* (1962), 46 et seq.; *Comparative Federalism* (1st edition, 1962; 2nd edition, 1965) 46 et seq.

⁹ *Federalism and International Relations* (Hon. Paul Martin, Secretary of State for External Affairs, Ottawa) (1968), p. 14.

which was the final court in that case, did not challenge this opinion. Thus, in no respect did the judges question the external affairs power of the Canadian Government as such or support the view that provincial competence extended abroad.¹⁰

What both federal White Papers signally omit to tell their, presumably, predominantly lay (non-legal) readers is that the Supreme Court of Canada was split right down the middle in the *Labour Conventions* case — three to three, with a very strong dissent by Mr. Justice (later Chief Justice) Rinfret, the leading French-Canadian jurist on the Court, and individual dissenting opinions by two other judges, Justices Cannon and Crocket.¹¹ Chief Justice Duff's *obiter dictum* as to the power to make treaties, and it is really no more than an *obiter dictum* after all, represents in fact only his own views and those of certain of his (English-speaking) colleagues in a six-man bench of the Canadian Supreme Court. The second federal White Paper is surely guilty of archness in noting that "the Privy Council . . . did not challenge this opinion [of Duff]".¹² Why on earth, of course, should the Privy Council have bothered to do so, simply to strike down an *obiter dictum*? The essence of judicial craftsmanship, as classically practised by the Privy Council and its domestic British counterpart, the House of Lords, has always been to concentrate on the *material* facts before the court and on the rules of law that flow from them: the question at issue in *Labour Conventions* was treaty-implementation as such, and the *ratio decidendi* of the case, in the Privy Council, is properly limited to that without any unnecessary expenditure of judicial energy on a running down of the red herrings of irrelevant *obiter dicta* from individual judges in the courts below.

The two federal White Papers, in seeking to build up Chief Justice Duff's *obiter dictum* in the Court below into something more substantial than that, are strangely silent about the dissenting opinions, and especially the dissenting opinion of Mr. Justice Rinfret. This may be constitutionally cute, of course, but it renders a public disservice in thereby suppressing discussion of a highly thoughtful judicial examination that goes to the core of the problem as to the foreign affairs power in a federal state.

Mr. Justice Rinfret notes, at the outset of his opinion,

. . . (the) very great distinction between the power to create an international obligation and the power to perform it when once it has been created.

¹⁰ *Federalism and International Conferences on Education. A Supplement to Federalism and International Relations* (Hon. Mitchell Sharp, Secretary of State for External Affairs, Ottawa) (1968), p. 10.

¹¹ [1936] S.C.R. 461.

¹² *Ibid.*

What follows, however, poses the fundamental dilemma in attempting to strike a rational balance between federal powers and provincial powers in the whole area of treaties (treaty-making and treaty-implementation).

To continue with Mr. Justice Rinfret's opinion:

While it is, no doubt, perfectly true that "overwhelming convenience — under the circumstances amounting to necessity" (Anglin C.J.C. in the Radio Reference [1931] S.C.R. 541, at 545, 546) dictates the answer that the performance of obligations, both federal and provincial, arising out of international agreement must be left exclusively to the jurisdiction of the Dominion Parliament, I fail to see the same necessity with regard to the power to create these foreign obligations. When once they have been undertaken, Canada is in honour bound to perform them. If the effect of the undertaking is that a subject of legislation within the exclusive jurisdiction of the province will thereby be transferred from that jurisdiction to the jurisdiction of the Dominion Parliament, I consider it to be within the clear spirit of the British North America Act that the obligation should not be created or entered into before the provinces have given their consent thereto. In the particular case that we are now considering, it is my humble view that such was the effect of the judgment of this Court in the matter of the reference of 1925. [1925] S.C.R. 505. . . .

It does appear that it would be directly against the intention of the British North America Act that the King or the Governor-General should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament, are prohibited by the Constitution from assuming jurisdiction over these matters.

Almost every aspect of community decision-making today, in the modern federal state, will have some transnational aspects, whether political, social, or economic, or a mixture in part of all of these. If, simply because some such transnational aspects are present in a given problem-situation, it is to be automatically characterized, in federal constitutional terms, as "foreign affairs", and therefore a matter of exclusive *federal* constitutional competence, we would be left either with an extraordinarily centralized federal system or else — what may be politically more likely, having regard to the present political currents in Canada — outright political separatism on the part of the Province of Quebec. I take it that, on this account alone, this particular federal option — that of the expansionist, preemptive federal foreign affairs power, according to the United States *Migratory Birds* rationale — is politically unacceptable in Canada today, and that we must look, therefore, to other options. These are, essentially, three in number.

Option number one might be called the Chief-Justice-Duff-cum-Privy-Council-in-Labour-Conventions-option — that is to say, a federal monopoly of treaty-making power, but with a division of the treaty-*implementation* power between the federal government and the provinces according as to whether the subject matter would fall within either federal or provincial legislative powers as defined, respectively, in sections 91 and 92 of the B.N.A. Act. I regard this option, on the concrete record of the experience in Canada since 1937 and on the record, also, of West German federal experience since 1957 (the time of the *Reichskonkordat* opinion) as politically quite viable for Canada. It would help, however, if the operational practice, in Canada, could be recognized as being constitutionally controlled, as in West Germany, by the principle of federal comity involving recognition of the mutual deference and cooperation that any one party to a federal system owes to the other parties, and recognition also of the permissible limits of federal-provincial governmental action *inter se* in the interests of good federalism.

Option number two might be called the Mr.-Justice-Rinfret-option — that is to say, recognition of a constitutional right of the provinces to participate in the treaty-making process where the subject matter would fall within provincial legislative powers as defined in section 92 of the B.N.A. Act. The participation of the provinces in the treaty-making process, in such case, might be effectuated either by imposing a constitutional obligation on the federal government to join the provinces with it in the actual treaty negotiations, with a full right of provincial veto on the conclusion of the proposed treaty; or else by giving the provinces a full right of veto at the treaty ratification stage. Here the possibilities are endless, of course, from the federal constitutional-institutional viewpoint; one possibility, looking now to recent federal government and provincial proposals for reform and restructuring of the federal Senate, might be to require all treaties to be submitted for ratification to the Senate, the Senate necessarily having been reconstituted, on this hypothesis, as a provincially appointed or elected, essentially “Provincial Rights”, house. Some of the contemporary Quebec writing and thinking, in this area, seems to favour *option number two*, certainly in the insistence on the constitutional right of the provinces to join in the making of, and if need be to veto, any treaties concerning section 92 (provincial) legislative matters. It does not appear, however, that the correlative proposition advanced by Mr. Justice Rinfret — namely, a federal monopoly of the treaty-*implementation* power in the event of such joint or mixed, federal-and-provincial *made* treaties — has been accepted as yet by Quebec spokesmen or writers.

Option number three is in some respects the simplest of all, from

the technical legal viewpoint; but, perhaps because of its very simplicity, it seems largely to have eluded the political leaders and spokesmen who have, up to date, seemed to have been overly concerned with direct political confrontations and with the symbols and external trappings of sovereignty that so often accompany such power ploys. Option number three consists, essentially, of enlisting the virtues of constitutional self-restraint and moderation and of not escalating into a federal-provincial constitutional crisis over foreign affairs and the treaty power, before one is sure that, in substance, it really is "foreign affairs" or even "treaties" that are involved. The key to the resolution of the problem of conflicting federal and provincial claims to legislative competence lies, therefore, in the first instance, in prudent characterization of a given problem-situation, and preferably a characterization given, not in the abstract, but against a concrete factual record. Such a pragmatic, empirically based, approach to constitutional characterization should indicate reasonably clearly whether what is involved in the problem is really "foreign affairs" in the classical sense; or simply a normal question of provincial legislative competence involving, at the same time, some transnational aspects. Option number three, with its emphasis on scientific pragmatism and on an empirically based approach, and on the avoidance of essentially *a priori*, un-fact-oriented, absolutism, seems to have been first discussed, at the political level, by the province of Ontario, looking for some more rational solution of the current Ottawa-Quebec noisy conflicts over the "foreign affairs" power. But it seems now, with the passage of several years, to have recommended itself more generally by its very sobriety and essential moderation and commonsense, as the best practical solution of the legal dilemma and, as such, by actual practice in those several years, to have become the new federal constitutional law-in-action.

Fact and Fancy in Transnational Provincial Activities

Quebec's Cultural Accords with *la Francophonie*

When Premier Jean Lesage's Liberal Party government in Quebec first began, in the immediate aftermath of the inauguration of the "Quiet Revolution", to assert the claims of the Province of Quebec to be able, in its own constitutional right, to negotiate and to conclude cultural and educational exchange agreements with France and other member-countries of *la Francophonie*, without the intervention or involvement of the federal government in Ottawa, the Quebec arguments gained weight politically from a certain, no doubt unconscious, confusion of treaty-making and treaty-implementation. But the arguments, nevertheless,

seem posited on the central notion that what was involved was, if not treaties themselves, then at least a species of treaties. The argument as to an independent treaty-making power, inhering in the Province of Quebec alone, in respect to matters falling within Quebec provincial heads of legislative power as enumerated in section 92 of the B.N.A. Act, was based, variously, on examples and practice or simply the positive constitutional law texts, drawn from Austria-Hungary of the Hapsburg era; Imperial (Wilhelminian) Germany; post-World War II (Bonn) Germany; Switzerland; and the Union of Soviet Socialist Republics under the current (1936, Stalinist) constitution. The argument as to a treaty-*implementation* power, inhering in the Provinces of Quebec alone, in respect to matters falling within the Quebec provincial heads of legislative power as enumerated in section 92 of the B.N.A. Act, was based, of course, on the *Labour Conventions* rationale and, secondarily, on the *Reichskonkordat* decision from West Germany.

The case for, in effect, an autonomous, and comprehensive, Quebec "foreign affairs" power in cultural and educational matters, seems to have had, as its principal spokesman in the political arena, the Quebec Liberal Party Minister for Education, Paul Gérin-Lajoie, the legal argument being formulated attractively and persuasively, and with appropriate supporting footnote material derived principally from comparative law.¹³

I must confess, however, that the examples cited are, except for the Bonn government, minuscule, and usually few and far between. The practice under the Bonn constitution has been principally concerned with the issue of special agreements (Concordats) as to Catholic religious education in the primary and secondary schools, made between the West German *Länder* or provinces, and the Vatican. In the most recent instance, however, involving the *Land* of Niedersachsen, the Vatican in fact acted in full accord with the principle that such agreements are subject to the approval and endorsement of the federal government of West Germany, the Vatican itself submitting the text of the Concordat to the West German federal foreign ministry for approval and endorsement.

In debating with Jacques-Yvan Morin in June 1965, at the Annual Meetings of the Association of Canadian Law Teachers in Vancouver, on

¹³ See M. Gérin-Lajoie's paper, published in *The Montreal Star*, March 19, 1968; and see my own response thereto, Education and Foreign Affairs: re-examination of Canada-Gabon controversy, *The Montreal Star*, March 29, 1968. And see generally, J. Brossard, A. Patry, and E. Weiser, *Les pouvoirs extérieurs du Québec* (1967); and see the comments by C. Bourne, in *A Look Ahead: Confederation: Projection vers l'avenir* (National Centennial Conference of Canadian Law Students, Dalhousie Law School, Halifax, 1967) (1969), p. 107 et seq.

the subject of the constitutional competence within federal systems as to international agreements, I made the following comment which, on looking back, seems even more relevant today than when first formulated in 1965:

I take it that a treaty is merely one species of international agreement whose legal significance is that it brings into play particular international law consequences not necessarily applicable to the other species of international agreements. . . .

In the end, therefore, foreign states or instrumentalities seeking to do business with Canadian provinces by other than the more direct, treaty route, must do so at their own risk and with a certain awareness that they will be receiving somewhat less than the full range of legal protections and safeguards that they would obtain by seeking to make a treaty with Canada. If, however, they wish to proceed in that way and deal directly with the provinces or provincial authorities in matters otherwise within provincial competence, that is their own business and that of the provinces concerned, and certainly not any business of the Dominion.

By the same token, I cannot see why the Dominion should be upset if Quebec or any other province should wish to make cultural or cultural exchange agreements directly with other countries, as Quebec has in fact done with France. The essence of such agreements is that they rest on goodwill, and mutual, reciprocal benefit, for their effectiveness: one does not go to law over them. I take it that France and Quebec concluded their recent (1965) agreement because of their common interest in a cultural matter in regard to which the Dominion seemed to have been either aloof and disdainful, or else deplorably slow to act.¹⁴

Since 1965 we have had the Gabon "crisis", over Gabon's invitation of the Quebec government to an educational conference in Libreville early in 1968. In the Gabon affair, the federal government in Ottawa seems to have concluded that the issue was serious enough to treat as an exercise in diplomatic brinkmanship, escalating up to a termination of diplomatic relations between Canada and Gabon. The federal government's decision to treat the affair as an *acte de guerre* was based on the fact of the Gabon government's having sent the invitation to the Quebec government directly, and not via the intermediary of Ottawa.

After Gabon, there was a "cloak and dagger" drama — "the case of the missing invitation" — an invitation extended by the Republic of Tunisia to the Quebec government to attend an educational conference in Tunis, the invitation being sent by Tunisia to Quebec *via the inter-*

¹⁴ The Constitutional Competence within Federal Systems for International Agreements, in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Queen's Printer, Toronto, 1967, p. 149, at 153-4. Published also in 1 *Canadian Legal Studies* 145 (1966).

mediary of the federal government in Ottawa, but somehow being mysteriously lost by Ottawa and not delivered to the Quebec government until after the conference in Tunis was over.

Finally, came a Graustarkian, comic opera situation — the conference in Niamey, Nigeria, in February 1969, when Canadian and Quebec “delegations” coexisted rather uneasily together within a common delegation, with two sets of flags (Canadian and Quebec), and with each government assuming the travelling and related expenses of its own delegation.¹⁵

The elements of the Theatre of the Absurd inherent in these three separate episodes of confrontation between the federal government in Ottawa and the government of Quebec were manifested in July 1969, when a Gabon delegation visited both Ottawa and Quebec, and when it was announced, by the federal government in Ottawa, that Canada and Gabon would resume diplomatic relations.¹⁶ At the same time, the immediate subject of the twin quarrels over Gabon — between Ottawa and Quebec, on the one hand, and between Ottawa and Gabon on the other — was revealed to have been no more than the exchange of some half dozen teachers and students and the provision of technical assistance in staffing a new public health centre in Libreville.¹⁷

Looking back, it may be suggested that unedifying public quarrels of the nature of the Gabon “crisis” have been rather damaging to all of the parties involved, for they reveal a preoccupation with old-fashioned, abstract and theoretical, questions of where sovereignty lies and whether it is divisible in any sense — in short, an atavistic preoccupation with the “symbols” of government at the expense of the substance, here the furnishing of technical assistance and development aid to a “new” country that is badly in need of them.

My own conclusion is that what was involved in the Gabon “crisis”, in the first place, was a transnational provincial activity raising no international law questions or legal obligations, and resting, for its efficacy, upon its underlying humanitarian impulse and no more. There was, therefore, no question of “foreign affairs” or a “treaty”, as such. If any agreement had been signed at Libreville, it would have been, at best, a transnational agreement being less than a treaty — perhaps an international “non-treaty”, to borrow a term once more from the Theatre of

¹⁵ See generally Editorial, Is Gabon Incident that important?, *The Gazette*, Montreal, June 13, 1968; Editorial, Une représentation mais deux délégations, *Le Devoir*, Montreal, January 14, 1969; and see also Niamey. Le Quebec assume ses propres dépenses, *ibid.*, February 19, 1969; Le “grand espoir” de Niamey. Ottawa et Québec sont d'accord, mais la guérilla continue! *ibid.*, February 28, 1969.

¹⁶ See, for example, Le Canada renoue avec le Gabon, *Le Devoir*, Montreal, June 27, 1969; Resume ties with Gabon, *The Montreal Star*, June 27, 1969.

¹⁷ L'entente cordiale Canada-Gabon-Québec, *Le Devoir*, Montreal, July 4, 1969; Trudeau et le Gabon, *ibid.*, July 5, 1969.

the Absurd.¹⁸ In any event, there was no particular reason, on this view, for the involvement of the federal government in the whole affair; and the federal government may have made an error of judgment and, in the end, displayed a lack of a sense of proportion, and certainly a lack of a sense of humour, in seeking to intervene in the whole Gabon affair in the first place.

I have left to one side, for the moment, two aspects of the transnational provincial activities question. First is the general bearing of the constitutional principle of federal comity upon the Gabon "crisis" and upon related events. In my discussion in 1965, I made the following additional comment:

¹⁸ Examples of such transnational agreements, being less than treaties, are the agreement, concluded in the era of Premier Jean Lesage's Liberal government in Quebec, between Renault (a property of the French government), and the Société Générale de Financement (a provincially-owned investment corporation of the province of Quebec) granting the latter a licence to manufacture Renault cars in Canada; or agreements between governmental fire-fighting agencies of a Canadian province and of an American state on common fire control and prevention measures; or similar agreements as to joint road-building projects, as between a Canadian province and an American state; or even agreements between a Canadian province and individual American states as to the best commercial use of a river flowing (so far as Canada is concerned) wholly within one Canadian province. The examples are, of course, legion; one of the problems in obtaining detailed records of such transnational agreements entered into by the Canadian provinces is that they have very often been highly informal in their modes of creation, and very often concluded, not by the Prime Minister of the Province or his Cabinet, but by intermediate-rank Civil Servants who have acted on a purely functional, utilitarian basis related to the province's needs, and dealt directly with their civil service counterparts in other countries without apparently being aware that, in doing what comes naturally, they may have created conceptualistic problems for latter-day commentators. Such transnational agreements, as a survey of Ontario government practice has revealed, may sometimes be evidenced in an ordinary commercial contract, sometimes in a formal exchange of letters, sometimes in reciprocal legislative action, sometimes simply in parallel administrative action. No one is sure of the exact number, but a good guess would appear to be that there must be many hundreds of such transnational agreements concluded by all of the Canadian provinces over the years, even more perhaps by Ontario than Quebec in view of Ontario's greater degree of industrial and commercial development, and never raising any political, constitutional, or diplomatic quarrels, over the years, until the recent Gabon affair produced the dramatic Ottawa-Quebec confrontation. The essence of such international "non-treaties", of course, is that they afford none of the international law protections of a "treaty": apart perhaps from the limited *parens patriae* protections that any one nation-state might choose to invoke on behalf of its own citizens (including private corporations and even provincial departments or statutory authorities), the effective legal recourse, if any, would be no more than the ordinary legal remedies through the ordinary courts. As one provincial civil servant said to the present writer, it would normally be unthinkable to consider legal action against, say, a neighbouring state of the United States, in respect to any such transnational agreement. Such agreements rest, therefore, essentially on their reciprocal benefits and convenience, and their mutual commonsense, and not much else, for their effectiveness; but, in terms of modern legal science, that would generally be considered to be quite as effective as, if not more effective than, a formal legal sanction. See generally Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Queen's Printer, Toronto, 1967, pp. 153-154; and see also R. J. Delisle, *ibid.*, pp. 138ff.

Exercise by a member-state or province of a federal system of its own constitutional powers, in such a way as deliberately to embarrass or frustrate the federal government in the conduct or exercise of its own federal powers may, if sufficiently flagrant, constitute a breach of federal comity and so might fail. The conceded initial constitutional power, in such a case, would fail because of the unconstitutional manner or mode of its actual user.¹⁹

It is not completely clear or certain what the facts actually were at the commencement of the Gabon "crisis". Was it really, as the federal government in Ottawa seemed to believe at the time, some sort of sinister plot, fashioned by President de Gaulle with the active collusion of the Gabonese and Quebec governments and designed merely to embarrass or irritate Ottawa? If these were the real facts, of course, then there would be a clear offence against the principle of federal comity that would be constitutionally controllable, as such, in the courts. On the whole, however, it is difficult to avoid the impression that Prime Minister Pearson and also federal Justice Minister Trudeau, as he then was, in handling the matter for the federal government, responded too hastily, on the basis of imprecise or uncertain facts, and in the end overreacted to the situation. Having regard to the extreme disproportion in military, economic, and simple diplomatic power, as between Canada and Gabon,

¹⁹ Ontario Advisory Committee on Confederation, *op. cit.*, p. 157. It is often forgotten, of course, that emphasis on protocol and procedure, and on forms and ceremonies, in dealings between countries, is giving way increasingly to a new functionalism in which the emphasis is on doing what comes naturally — what is sensible and reasonable — without worrying too much, in advance, as to abstract (essentially nineteenth century, after all) issues of sovereignty. Thus Canada made agreements with the Soviet Union while the Cold War was still on, to sell hundreds of millions of dollars' worth of wheat to Russia, the deal being engineered by the Department of Trade and Commerce, rather than by External Affairs, presumably to avoid offending the United States. Again, the Department of Trade and Commerce made a deal, to sell further hundreds of millions of dollars' worth of wheat, to Communist China, even though Canada did not then accord diplomatic recognition to, or maintain diplomatic relations with, Communist China.

This "new" diplomacy, with its essentially functional orientation, is of course as likely to be carried on by the more general, service departments, as by the regular diplomats in the foreign ministries. It may also be carried on by private industry, or even educational institutions. It is often forgotten, for example, that the foreign operations of great private corporations like Texaco or Aramco, or even of private educational foundations like the Ford or Rockefeller Foundations, are often far more significant in their financial and economic terms and in their impact on the domestic policies of the foreign countries with which they are dealing, than are the activities of very many of the 120-odd member-countries of the United Nations. The universities themselves, of course, often administer significant "foreign programs": *quaere* whether the cultural and educational exchanges involved in the Gabon "crisis" could not all have been achieved as purely private arrangements between, say, the Université de Montréal and the Université Laval, on the one hand, and the Gabonese government on the other, without raising any cause for an Ottawa-Quebec confrontation.

it might perhaps have been wiser, and certainly more elegant, for Ottawa to have given little Gabon the benefit of the doubt.

In the affair of the "lost" Tunisian invitation, this is precisely what the Quebec government did in relation to the federal government in Ottawa, giving Ottawa the benefit of the doubt and assuming, perhaps unwarrantedly on the facts, that Ottawa had not deliberately sought to lose the Tunisian invitation to Quebec, through any casual malice or ill-will. If it had been otherwise, of course, Ottawa, for its part, would clearly have violated all accepted notions of federal comity and the code of constitutional good-manners that any one party in a federal system owes it to the other parties in the federal system to observe.

The last aspect of the transnational provincial activities question relates to the general bearing of one-time External Affairs Minister Paul Martin's special project of a *loi cadre* or "umbrella agreement" expressly recognizing or sanctioning provincial educational or cultural agreements with specific foreign countries.²⁰ Mr. Martin's special project of the "umbrella agreement" has been continued and extended by his successor, Mitchell Sharp, bearing testimony, at once, to the genuine flexibility and imagination and wit of the professional department formally charged with the conduct of foreign affairs at the federal level, and also to the fact that if there has been any unnecessary rigidity and *a priori* conceptualism and dogmatism, at the federal level, it has not necessarily originated in the Department of External Affairs.

My own conclusion is that the *loi cadre* or "umbrella agreements" are legal surplusage — that is, that they have been legally redundant and unnecessary in so far as all the provincial transnational educational or cultural exchange agreements concluded up to date have raised no "foreign affairs" questions, since giving rise to absolutely no legal obligations, international or otherwise. On the other hand the practical effect of having an "umbrella agreement" already in existence is to reinforce in terms of prestige, by conferring international law status upon what would otherwise be simple, unenforceable, transnational accords. There seem many reasons why it might be constitutionally good politics and also good sense, for the provinces to respond to the new pragmatism manifest in the federal *loi cadre* project and to seek to bring any future educational and cultural accords within the general framework of the

²⁰ See Franco-Canadian Cultural Agreement, 17 *External Affairs* (Ottawa) 513, (December, 1965); Text of Cultural Agreement between the Government of Canada and the Government of the French Republic, *ibid.*, 514; Entente on Cultural Cooperation between France and Quebec, *ibid.*, 520; Text of Entente on Cultural Cooperation between the Government of the French Republic and the Government of Quebec, *ibid.*, 521.

“umbrella agreements”; and many reasons why it might be constitutionally good politics and also good sense for the federal government to try to anticipate provincial needs by concluding such “umbrella agreements” in advance of provincial demands, and to conclude them in terms sufficiently general and comprehensive to encompass any reasonable provincial proposals.

The Off-Shore Mineral Rights Issue

The *Off-Shore Mineral Rights* issue arose as a dispute, between the federal government and those provinces having a coastal littoral, concerning the respective federal and provincial competences and legislative jurisdictions in regard to the development and exploitation of mineral resources — and especially oil — under the territorial waters, contiguous zones, and the continental shelf of Canada. The substance of the dispute has been an economic conflict, over the respective rights to collect the licensing fees and royalties accruing from such development by private companies. At stake, really, has been a federal-provincial economic conflict involving, potentially, hundreds of millions of dollars per year.

The federal government, claiming a federal monopoly of constitutional competence over the sub-marine oil and mineral deposits, referred the matter to the Supreme Court of Canada for an Advisory Opinion, relying, among other things, upon the claimed federal general residual legislative power under section 91 of the B.N.A. Act; and also relying, somewhat vaguely, on the foreign affairs power under the constitution. Six provinces — British Columbia, Ontario, and the four Atlantic Provinces — joined in contesting, in the Supreme Court, the legality of the federal government's claims. The Province of Quebec, though not formally joining with the six provinces in challenging the federal government's claims before the Supreme Court, had indicated, in its public statements, an even stronger constitutional position than the other, challenging provinces, against the federal government's claims.

The opinion rendered by the Supreme Court of Canada, *Reference re Ownership of Off-Shore Mineral Rights*,²¹ is an unusual one, in more than one respect. First, though rendered by a seven-man bench of the Supreme Court of Canada, the judgment, breaking sharply with general Canadian Supreme Court practice and indeed general Commonwealth judicial practice also, is an anonymous, unsigned one, being styled simply as a “Joint Opinion” without any formal identification of the authorship; though, on technical and stylistic grounds, there are some

²¹ 65 D.L.R. (2d) 353 (1968).

reasons for suspecting that the opinion is the work of two separate judges, one judge doing the first half of the opinion and the other judge completing it.

Beyond the technical, procedural point of the manner and method of judicial opinion-writing, there remain some important questions of substantive constitutional law, going to the intellectual bases and the reasoning of certain parts at least of the *Off-Shore Mineral Rights* opinion. For example, in its discussion of the territorial sea, the Supreme Court comments, in its opinion:

... The rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.²²

Again, in relation to the continental shelf, the Supreme Court states, in the course of the same opinion:

There are two reasons why British Columbia lacks the right to explore and exploit (the continental shelf) and lacks legislative jurisdiction:

(1) The Continental shelf is outside the boundaries of British Columbia, and

(2) Canada is the sovereign state which will be recognised by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.²³

On the basis of these statements in the Court's opinion, it looks very much as if the Supreme Court is now making the fatal equation between jurisdiction at the international law level in relation to foreign countries, and jurisdiction (in a federal state) at the internal or municipal law level as between the federal government and the governments of the member-states or provinces. That there is no logical or necessary connection between the two is at the whole core of the Privy Council's ruling in the *Labour Conventions* case in 1937; as is the further, policy-type argument that considerations of liberal pluralism within a federal state may well demand that that federal state submit to some inconveniences from time to time in the practical conduct of foreign policy, as the price of maintaining fidelity to the constitutional powers of its member-states or

²² 65 D.L.R. (2d) 353, at 376 (1968).

²³ 65 D.L.R. (2d) 353, at 380 (1968).

provinces as against attempted inroads by the federal government purporting to be based on the federal foreign affairs power. Since it strains credulity to believe that the Supreme Court of Canada intended, in the *Off-Shore Mineral Rights* reference, to overrule the *Labour Conventions* decision *sub silentio*, one's conclusion may have to be that the *Labour Conventions* case was not properly presented by counsel, in the argument in the *Off-Shore Mineral Rights* reference, to a court whose opportunities of ruling on international law issues are few and far between; and that this apparent *non sequitur* in the *Offshore Mineral Rights* reference was therefore arrived at by the Court *per incuriam*. This is rather startling, of course, in view of the enormous economic and financial interests turning on the outcome of the Court's opinion, and in view also of all the implications of the Court's opinion for the future of Canadian federalism.

The *Off-Shore Mineral Rights* opinion rendered by the Supreme Court has, of course, been criticized not merely on behalf of the six provinces who formally contested the federal government's claims to a constitutional monopoly, but also, and much more strongly, on the part of the government of the Province of Quebec, and this at a time when the Court is under attack in Quebec on other grounds. For the publication of the *Off-Shore Mineral Rights* opinion has been followed by a renewal of the arguments for breaking the federal government's monopoly of the power of appointment of judges to the Supreme Court of Canada, and a renewal also of the arguments for creation of a special constitutional court following general continental European, and especially West German, models.

The Montreal International Airport Quarrel

The Montreal International Airport quarrel, between the federal government and the Province of Quebec, has its roots in the general need to make further long-range provisions for the handling of international air traffic to and from Montreal, not merely because of vastly increased air traffic but also because of the rapidly approaching era of the "jumbo" jets and of the new supersonic passenger aircraft. Plans for extension of the existing international airport, Dorval, in the south-western suburbs of Montreal having, perhaps too quickly, been abandoned on the basis of the noise factor, the Province of Quebec studied a number of alternative sites to the east of Montreal — south-east, due east, and north-east of the city, but especially the south-eastern site — the reason for this easterly orientation being that it best accorded with the scientific projections made by the Province of Quebec's economic planning and research bureau as to the future trends and directions of economic development

in the province; the provinces' economic advisers having concluded that the optimum economic development of the province, in the future, lies along a Montreal-Quebec City axis — that is, along a ribbon of economic development running due east and north-east from Montreal towards the provincial capital in Quebec City.

The Province of Quebec stressed the new role of the airport today as regional economic catalyst (a role recognized particularly in the advanced airport location and planning science in the United States), in advancing the case for a site east of Montreal. The province pointed also to the enormous financial expenditures expected from the province in respect to construction of airport access roads, urban development, and the like. The Province of Quebec proceeded to argue the need for recognition of a common federal-provincial interest in a rational choice for the new airport location; and from that the province went on to press the case for formation of a joint federal-provincial committee to arrive at just such a rational choice.²⁴

The federal government's response, however, was quite categorical. Claiming a monopoly of constitutional power to decide where the new airport should be located, the federal government rejected the province's arguments, and insisted on placing the new airport in a site north-west of Montreal — not merely away from the main projected axis of future economic development for the Province of Quebec as seen by the province's economic advisers, but in a diametrically opposed direction, towards the Quebec frontier with the Province of Ontario.²⁵

While direct, bilateral negotiations for formation of a joint federal-provincial committee to decide on a new airport location were actually going on between the Quebec Cabinet Minister handling the matter for the Quebec government, Robert Lussier, Quebec Minister for Municipal Affairs, and the new federal Transport Minister, Don Jamieson,²⁶ Prime Minister Trudeau flew in by helicopter to the federally favoured north-western site, at Sainte-Scholastique, to deliver a speech declaring the federal choice of the north-western site to be irrevocable.²⁷

²⁴ See, generally, La querelle de Sainte-Scholastique, *Le Devoir*, Montreal, May 17, 1969; Editorial, Des documents nouveaux sur le conflit de l'aéroport, *ibid.*, May 17, 1969.

²⁵ See, generally, Marc Lalonde, La querelle de Sainte-Scholastique: Ottawa répond au directeur du Devoir, *Le Devoir*, Montreal, May 26, 1969. And see the responses to Mr. Lalonde: Claude Ryan, La querelle de l'aéroport: Où est la vérité? *ibid.*, May 28, 1969; Richard Beaulieu, Le choix de Sainte-Scholastique: un exemple vécu de la manière dont Ottawa pratique la collaboration avec Québec, *ibid.*, June 5, 1969; E. McWhinney, La querelle de Sainte-Scholastique, *ibid.*, June 6, 1969.

²⁶ L'aéroport: Lussier se rendra de nouveau à Ottawa, *Le Devoir*, Montreal, June 7, 1969.

²⁷ Trudeau à Ste-Scholastique: Ottawa ne reviendra pas sur sa décision, *Le Devoir*, Montreal, June 16, 1969. And see the response, Paul Sauriol, Intransigence d'Ottawa, *ibid.*, June 17, 1969; Lussier annule la réunion prévue avec Jamieson, *ibid.*, June 18, 1969.

The B.N.A. Act, of course, as befits a document drafted in the mid-nineteenth century, contains no direct allocation, one way or another, of the constitutional competence over airport location, air communication, aeronautics, or aviation generally. In 1932, in the *Aeronautics* case,²⁸ the Privy Council had held that there was a constitutional power, in the federal government of Canada, legislatively to implement treaties entered into by the British government, on behalf of Canada, in the international aviation field. But this was a decision based directly on the old "British Empire" treaties section of the B.N.A. Act — section 132 — which was, of course, held by the Privy Council, in the *Labour Conventions* case in 1937, to be legally defunct in view of the intervening disappearance into history of the old British Empire and therefore also of the category of "British Empire" treaties, as such.

The only other decision in any way relevant on this whole question is the 1951 decision given by the Supreme Court of Canada in the *Johannesson* case,²⁹ an airport zoning case involving municipal (town) delegated legislative authority. Although, in the *Johannesson* case, the Supreme Court of Canada, in denying the municipal (town) authority, by implication decided in favour of the federal government's claims, the *Johannesson* rationale could, in the view of the Quebec government, because of its very special facts, very easily be distinguished from the facts of the Montreal International Airport quarrel, if the Supreme Court should ever want to do so: in technical, Common Law constitutional terms, on the Quebec government's view, its *ratio decidendi* was different.

In my own opinion, *Johannesson* itself stands as an example of an essentially abstract, conceptualistic, un-fact-oriented opinion, given in the days before modern Supreme Courts in modern federal states had so largely abandoned the old "jurisprudence of concepts" philosophy in favour of a jurisprudence of scientific pragmatism rendered against a detailed record of concrete social and economic facts.³⁰ The federal government, in any case, in the Montreal International Airport quarrel, relied on the general residual legislative power under section 91 of the B.N.A. Act of 1867.

The Province of Quebec, for its part, pointing to the newly accepted role of the modern airport as regional economic catalyst,³¹ chose to stress

²⁸ *In re Regulation and Control of Aeronautics*, [1932] A.C. 54 (P.C.).

²⁹ *Johannesson v. The Rural Municipality of West St. Paul*, [1952] S.C.R. 292.

³⁰ Compare, for example, the sustained judicial analysis, in depth, of the interests-complex involved in an analogous problem-situation, in *U.S. v. Causby*, 328 U.S. 256 (1946).

³¹ See, for example, *A Report on Airport Requirements and Sites in the Metropolitan New Jersey — New York Region* (Port of New York Authority) (1961); *National Airport Plan, Fiscal Years 1968-72*, (Department of Transportation); *The Airport — Its Influence on the Community Economy*, (Federal Aviation Administration) (1967);

those aspects of the choice of a location for the new Montreal International Airport having to do with regional economic planning, the provision of access roads and the like — all of these latter matters, of course, being ones generally accepted as being within provincial constitutional competence under section 92 of the B.N.A. Act. Avoiding all the temptations to argue that, because of this factor of the new community acceptance of the importance of economic factors in airport site location and choice, the subject should now be held as, in substance, falling wholly within provincial powers under section 92 of the B.N.A. and as having thus, in substance, become a *provincial* (and not a *federal*) constitutional monopoly, the Province of Quebec argued that the subject was one of *mixed*, federal and provincial jurisdiction, with some aspects falling within federal power (namely, air security matters), and other aspects falling within provincial power (namely, the economic and urban planning aspects).

In arguing for acceptance of such a new, mixed, federal-provincial jurisdiction, to be exercised on a basis of commonsense and mutual give-and-take and cooperation, the province necessarily sought to break away from the old “watertight compartments”³² conception of the division of legislative powers under the B.N.A. Act. According to the old “watertight compartments” view, the B.N.A. Act has established a constitutional dichotomy in which matters are either exclusively federal or exclusively provincial, with no possibilities of joint, cooperative, federal and provincial jurisdiction.

But the old “watertight compartments” approach has been increasingly demonstrated to be politically unrealistic, and ultimately frustrating and foolish, in an era when complex community problems demand complex institutional responses, involving cooperation, and not cut-throat competition, between the different levels of government and the different divisions of government in a federal system. The Province of Quebec’s innovatory approach in pleading for a cooperative, mixed, federal-provincial approach to decision-making on the new Montreal International Airport site was,³³ however, effectively nullified by Prime Minister

Quick, *Megalopolis Airport Requirements*, a paper presented to the Third Annual Meeting of and Technical Display by the American Institute of Aeronautics and Astronautics (1966); Sheppard, *State-Federal Economic Regulation of Commercial Aviation*, 47 *Texas Law Review* 275 (1969). And see generally Horonjeff, *Planning and Design of Airports* (1962).

³² The phrase “watertight compartments” was actually introduced into Canadian constitutional law, as a legal term of art, by Lord Atkin, in the *Labour Conventions* case, [1937] A.C. 326, 354 (P.C.).

³³ Compare, for example, *R. v. Burgess, ex parte Henry*, 55 C.L.R. 608 (1936); *Airlines of New South Wales Pty. Ltd. v. New South Wales*, 113 C.L.R. 1 (1964); *Airlines of New South Wales Pty. Ltd. v. New South Wales*, (no. 2), 113 C.L.R. 54 (1964).

Trudeau's *coup de théâtre* in which he asserted a federal monopoly of power to decide on the new site, the Province of Quebec being left with the choice either of accepting this unilateral federal decision or else of contesting the matter at law — before, of course, the Supreme Court of Canada.³⁴

The St. Jean-Baptiste Day Incident, 1969

St. Jean-Baptiste is the Patron Saint of French Canada, and St. Jean-Baptiste Day, on June 24 each year, is celebrated as the national day of celebration of French Canada, with the province of Quebec proclaiming a public holiday throughout the province. The actual celebrations are arranged by a private cultural association, the *Société Saint-Jean-Baptiste*, usually in cooperation with the local, municipal (town) councils, themselves of course statutory bodies acting under the ultimate authority of the provincial government. But the celebrations, in Montreal at least, have always had a quasi-public character, being usually attended by French-Canadian members of the federal Cabinet and members of the federal Parliament; by Quebec Provincial Cabinet Ministers and provincial Members of Parliament; and by foreign ambassadors and diplomats accredited to Canada.

The celebrations held in Montreal one year before — on June 24, 1968 — had been attended by Prime Minister Trudeau and had been marred by scattered violence. On the claim that it wished to avoid similar incidents in the celebrations of June 24, 1969, the *Société Saint-Jean-Baptiste* of Montreal did not invite Mr. Trudeau to attend the celebrations of 1969. Prime Minister Trudeau was, however, invited to attend celebrations in the town of Sherbrooke, east of Montreal, but this invitation was cancelled at the last minute as a result of a bombing incident directed against the premises of the local branch of the *Société Saint-Jean-Baptiste* which had invited Mr. Trudeau.

Prime Minister Trudeau reacted most vigorously to his own effective exclusion from the Quebec celebrations, involving both the non-event of his non-invitation to Montreal and also the withdrawal of his invitation

³⁴ The federal government's own rather facile tendency to acceptance of the Supreme Court as a federally oriented body — the federal government's "minion" — is perhaps to be seen in the easy confidence implicit in the comments of a federal government spokesman, concerning the possibility of Quebec's litigating the Montreal International Airport quarrel before the Supreme Court of Canada:—

"It's hogwash", said a key government source. . . . "In fact I doubt if the Supreme Court would even hear such a case. . . . The chances are 100 out of 100 that the court would confirm the Federal Government's right in this matter".

The Montreal Star, May 21, 1969.

to Sherbrooke. The Prime Minister indicated publicly that he did not wish the foreign ambassadors and diplomats — in all, some seventy foreign Ambassadors had been invited — to attend the Montreal celebrations.

The well-known French-language daily, *Le Devoir* of Montreal, sharply criticized Mr. Trudeau's action:

The reaction of Prime Minister Trudeau to the decision of the *Société Saint-Jean-Baptiste* of Montreal to invite the Ambassadors of foreign countries to the Parade on June 24 has been quite strange. We don't hesitate to qualify it as quite immoderate. A private organisation or a municipality can very well issue such invitations without going through the intermediary of the federal government.³⁵

Under Prime Minister Trudeau's pressure, however, the foreign ambassadors began to decline the invitations to the Montreal celebrations. The Municipal Council of Montreal withdrew its own invitation to the ambassadors to an official dinner in Montreal on the evening of the celebrations of June 24. And the celebrations themselves thus took place in Montreal, on June 24, without Prime Minister Trudeau but also without the foreign ambassadors.

The international and constitutional legal issues, of course, are clear. Any private association in Canada has the perfect right to invite foreign ambassadors to its functions; and those ambassadors have a perfect right to accept in their capacity as ambassadors, as long as they remain officially accredited to Canada. It is in the last phrase that we have the key to the problem, since the power of the government of the host or receiving country is complete, and if need be quite arbitrary, as to declaring any foreign ambassador *persona non grata*. Prime Minister Trudeau, therefore, clearly acted within his legal powers in pressuring the foreign ambassadors not to accept the invitations to the Montreal celebrations, both from the private association and from the municipal council. From the political viewpoint, however, Mr. Trudeau may have overreacted and, in the process, given far more national and international publicity to his own non-invitation to the Montreal celebrations and to the withdrawal of his Sherbrooke invitation, than those events might otherwise have received.³⁶

³⁵ Translated from *Le Devoir*, Montreal, June 1969.

³⁶ See the statement by F. A. Angers, President of the *Société Saint-Jean-Baptiste* de Montréal, *La S.S.J.B. de Montréal et les fêtes de la Saint-Jean*, translated from *Le Devoir*, Montréal, July 12, 1969:— "That Mr. Trudeau . . . should have applied himself to do everything in his power to sabotage the Montreal festivities by exercising pressure of moral constraint on the ambassadors is not to his personal credit, and in any case it does not contribute to Canada's prestige, in the World, as a serious power.

Federal Comity and the Pragmatic, Empirical, Problem-Oriented, Step-by-Step Approach to Federal-Provincial Relations

In looking at the concrete record of federal-provincial relations in Canada, in recent years, it may be suggested that the federal government has tended at times to be overly concerned with questions of symbols and abstract ideology and indeed of political "face", at the expense of concrete problem-solving; and that it has, on the whole, given too much stress to issues of constitutional power in the abstract, seeking to rest on the old-fashioned notion of a federal-provincial constitutional dichotomy with "watertight compartments" of power, at the expense of a more pluralistic, cooperative approach to decision-making in the complex federal society of today. One may argue, in this regard, that the federal preoccupation with symbols and political "face" is reflected in the St. Jean-Baptiste Day incident. One may also argue that the federal dedication to a constitutionalism of conceptualist abstractions is to be seen in its general attitude on the *Off-Shore Mineral Rights* issue, and especially perhaps in the Montreal International Airport quarrel.

The achievement of a new Canadian constitution, reflecting the new pluralistic trends in Canadian society today, may well be rather long delayed now. For with the practical disappearance, today, of the intermediate options — "Associate State" status for Quebec, or at least a "special constitutional status"³⁷ — the political choices have tended to become polarized around one or other of the two main competing, conflicting options: outright separatism for Quebec, or else the achievement of a vastly more decentralized federalism with Quebec participating equally with the English-speaking provinces in the exercise of the resultant new provincial legislative powers and in the administration of the new financial resources that necessarily would come with them. It is possible, of course, that the lost intermediate options, involving some sort of particularized constitutional arrangements for Quebec in com-

³⁷ "For some years now, the federal government, particularly under Mr. Trudeau's influence, seems to have made itself a master in the art of provoking diplomatic incidents, right out of the comic operas, on the subject of French Canada's affairs".

³⁷ Some of the main alternative constitutional options advanced in Quebec in recent years, and their concrete federal institutional implications, are discussed by the present writer in *Federal Constitution-making for a Multi-national World* (1966), p. 88 et seq. The political reality of the disappearance today of these intermediate options — with their essentially middle-way, compromising approach to the reconciliation of the polar extremes of Quebec and federal (Ottawa) positions is perhaps symbolized in the resignation from the Quebec legislature in June 1969, of M. Gérin-Lajoie, the Quebec political leader normally most closely identified, in public, with the intermediate options, in order to accept an administrative post with the Economic Council of Canada.

parison to the other provinces, might have been perfectly capable of being lived with, in action. Examples of such particularized constitutional arrangements for one or more member-states or provinces exist, after all, in classical federal systems other than Canada. Yet the case for those intermediate options seems irretrievably lost today, from the political viewpoint; just as, in turn, perhaps, do the possibilities of maintaining a relatively rigid and highly centralized, non-pluralistic, federalism in Canada, granted the current strength and solidarity of provincial power positions, even apart from Quebec.

While the Quebec provincial elections of April 29, 1970 saw the victory of the provincial Liberal Party, running on an avowedly "federalist" platform, it is unlikely that the new premier, Mr. Bourassa, will be able to avoid these continuing pressures in Quebec, which operated on his Liberal predecessor Premier Jean Lesage and later on the Union Nationale leaders, Premiers Johnson and Bertrand, in favour of a decentralized, rather than a centripetal, federalism for Canada. The difference in Quebec is likely to be in emphasis and style: Mr. Bourassa's electoral campaign gave top priority to economic and fiscal questions, and consciously downplayed the quest for governmental "symbols" as ends in themselves.

The most fruitful way ahead seems to continue to lie in the pragmatic, empirical, problem-oriented, step-by-step approach to contemporary tension-issues of Canadian federalism, in which discussion of abstract ideology is avoided in favour of concrete problem-solving. This leads, inevitably, to the modern philosophy of cooperative, and not competing, federalism, with the prime emphasis being on joint, cooperative action, on a basis of commonsense and mutual give-and-take and reciprocal self-interest; and with the emphasis being also on saving possibilities for federal-provincial community action in the common interest, rather than on seeking to indulge in mutual frustration as too often has seemed to be the case in federal-provincial relations in recent years. This is, of course, in essence, the contemporary constitutional principle of federal comity.³⁸ Seen in this light, some, at least, of the quarrels and conflicts

³⁸ See, for example, Decision of the Federal Constitutional Court (Second Senate), March 26, 1957, 6 B. Verf. GE 309 (1957); *ibid.*, July 30, 1958, 8 B Verf. GE 104 (1959); *ibid.*, February 28, 1961, 12 B. Verf. GE 205 (1961); *New York v. U.S.*, 326 U.S. 572 (1946); *People of the State of New York v. O'Neill*, 359 U.S. 1, at 11-12 (1959), per Frankfurter J.; *Cooper v. Aaron*, 358 U.S. 1, at pp. 15-16 (1958); *City of Melbourne (South Australia and Western Australia Intervening) v. Commonwealth (Victoria Intervening)*, 74 C.L.R. 31 (1947) at pp. 83-84, per Dixon J.; *Airlines of New South Wales Pty. Ltd. v. New South Wales* (no. 2), 113 C.L.R. 54, at p. 144 (1964), per Menzies J. And see generally H. Bayer, *Die Bundestreue* (1961); W. Geiger, *Die Pflicht zu Bundesfreundlichen Verhalten*, *Frankfurter Allgemeine*, March 29, 1961, p. 11; E. McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court*, A. W. Sythoff, Leiden, International

between the provinces and the federal government in recent years in the foreign affairs field seem to be either exercises in sheer constitutional bad manners, or else case studies in intergovernmental perversity and deliberate non-cooperation, which, in either case, reflect unfavourably on the good judgment and commonsense of the two sets of governmental authorities, federal and provincial, concerned; and which also deny that spirit of pragmatic accommodation and reasonable compromise, and of constitutional moderation, that is, as Judge Learned Hand rightly noted, the life-blood of federal constitutionalism in its modern, liberal, pluralistic form.

Epilogue: Ottawa, Paris, and Quebec: *la Guerre des Boutons*³⁹

On July 18, 1969, *The Montreal Star* reported that Premier Bertrand had written to the new French government headed by President Pompidou asking that France end the two-year ban, imposed by President de Gaulle after his 1967 visit to Quebec, on French Cabinet ministers visiting Ottawa. As *The Montreal Star* commented:

We hope that, with Mr. Bertrand's commendable request to the new government of France, the era of bad manners between Ottawa and Paris may soon be over. It was not, in any sense, an elevating period. It did very little credit to those involved. . . . Ottawa for its part, could reciprocate by not finding *agents provocateurs* under prairie wheat stalks [a reference, apparently to the so-called Rossillon affair] and getting up-tight about every real and imagined breach of protocol.⁴⁰

In a subsequent, carefully worded report published in *Le Monde* of Paris, of July 20 and 21, 1969, which referred to *The Montreal Star* article, it was denied that any formal message, written or oral, had been transmitted by Premier Bertrand to the French government. *Le Monde* indicated, however, that Claude Morin, the deputy-Minister of Inter-Governmental Affairs of Quebec had, during his visit to Paris from July 7 to 11, 1969, made it known that Quebec would not consider the eventual visit of French Cabinet Ministers to Ottawa as capable of prejudicing good French-Quebec relations. *Le Monde* went on to cite certain symbolic gestures of good-will recently accorded by the new

Law Publishers, 1962, pp. 51ff.; E. McWhinney, *Comparative Federalism*, 2nd ed., University of Toronto Press, Toronto, 1965, pp. 78ff.

³⁹ *La Guerre des Boutons* by Louis Pergaud. French children's classic, first published in 1912, concerning two bands of twelve-year-old children, from rival villages, who engage in a running war in which the main preoccupation is the pursuit of symbols — in this case, buttons cut off the clothing of the members of the enemy band.

⁴⁰ Editorial, "Commendable Act", *The Montreal Star*, July 18, 1969.

French Foreign Minister, Maurice Schumann, and by President Pompidou, to the Canadian Ambassador to France, Paul Beaulieu. "Canada: Depuis l'accession au pouvoir de M. Pompidou les signes de détente se multiplient entre Paris et Ottawa",⁴¹

One month later, however, Premier Bertrand revealed that a personal message from him had in fact been carried by Deputy-Minister Claude Morin, to President Pompidou in July. Though not releasing the actual text of the message, Premier Bertrand summarized its contents in the following terms: "I expressed to the new French government my desire to maintain close relations with France without neglecting the relations with Canada".

In reporting Premier Bertrand's comments on his own message to President Pompidou, *Le Devoir* of Montreal interpreted Premier Bertrand's action as constituting a break with the politics and the strategy established by Mr. Bertrand's late colleague and immediate predecessor as Premier of Quebec, Premier Daniel Johnson.⁴²

Premier Bertrand's statement was warmly received by the federal government of Canada.⁴³ In September 1969, in apparent fulfilment of the new policy of *détente* between Quebec and Ottawa on the one hand, and France and Ottawa on the other, the French Minister of Justice, M. Pleven, paid an official visit to both Quebec and Ottawa. It was against a background of this newly found harmony as to provincial transnational relations, that Ottawa announced an agreement with the Republic of Gabon to re-establish normal diplomatic relations between Canada and Gabon, the occasion being an official visit by the Gabon Minister for Foreign Affairs, M. Jean Remy Ayoune, to Ottawa.⁴⁴

At this stage, however, fresh storm clouds appeared. Amid speculation in the English-language press, variously, that Quebec Premier Bertrand's "go-easy policy" had been torpedoed by his Party rival, Education Minister Jean-Guy Cardinal,⁴⁵ or that President Pompidou had reverted once more to the Gaullist "hard line" foreign policy,⁴⁶ it was

⁴¹ *Le Monde*, Paris, July 20 and 21, 1969.

⁴² "M. Bertrand à M. Pompidou. Les relations Québec-Paris ne doivent risquer de gêner les rapports Québec-Ottawa et Ottawa-Paris", *Le Devoir*, Montreal, August 19, 1969; and see also Paul Sauriol, "La politique étrangère du Québec", *ibid.*, August 20, 1969.

⁴³ See, for example, "Les relations avec la France. Ottawa est ravi de la nouvelle politique de M. J.-J. Bertrand", *Le Devoir*, Montreal, August 20, 1969.

⁴⁴ "Le Canada fixe les modalités de ses relations avec le Gabon et le Dahomey", *Le Devoir*, Montreal, October 8, 1969.

⁴⁵ "Cardinal torpedoed Bertrand's softline", *The Montreal Star*, October 8, 1969.

⁴⁶ "A friend to no Canadian", *The Globe and Mail*, Toronto, October 10, 1969; "Aggressive line still pursued: Pompidou standing on de Gaulle foreign policy", *The Montreal Star*, October 16, 1969.

announced that the French Minister of State for Foreign Affairs, Jean de Lipkowski (in effect, the junior minister to French Foreign Minister Maurice Schumann), was visiting Quebec as head of a five-man delegation of top French government officials, but without, at the same time, visiting Ottawa. It was subsequently revealed that Ottawa, on learning of M. de Lipkowski's planned visit to Quebec, had formally invited him to visit Ottawa as well, the invitation being renewed on three occasions, the last time by the Canadian Ambassador to France, M. Beaulieu. M. de Lipkowski himself insisted, after his arrival in Quebec, that his non-acceptance of the invitation to Ottawa constituted no affront to Ottawa, and that the visit was made within the framework of the existing Ottawa-France-Quebec arrangements.⁴⁷ The opinion that the de Lipkowski visit was within the spirit of the "umbrella agreement" of 1965 between Ottawa, France, and Quebec was also advanced by editorialist Paul Sauriol.⁴⁸ However, *Le Monde* of Paris was critical of the Pompidou government's handling of the visit.⁴⁹

Against this background, M. de Lipkowski held a press conference in Quebec City on October 14 in which he spoke of a "decision" taken in January 1969 by France and Quebec to go ahead with a France-Quebec telecommunications satellite, and in which he also declared that such a project was authorized by the Canada-France "umbrella agreement", by reason of the fact that the Canadian constitution of 1867 was silent on telecommunications and the fact also that the France-Quebec project had a cultural and educational bent — matters within provincial competence.⁵⁰ M. de Lipkowski was apparently misinformed as to the nature of the discussions between France and Quebec in January 1969, as to a France-Quebec telecommunications satellite ("Memini"), the Quebec government insisting that those discussions concerned only the "study of the project", and that no "decision" would be taken before the Spring of 1970.⁵¹

Prime Minister Trudeau replied by characterizing M. de Lipkowski as "impertinent" and "impolite"; and also "grossly misinformed", in his comments on the Canadian federal constitution and its division of

⁴⁷ "No snub to Ottawa says French Minister", *The Gazette*, Montreal, October 10, 1969; "Le Quai d'Orsay. Cette visite ne compromet pas les rapports Ottawa-Paris", *Le Devoir*, Montreal, October 11, 1969.

⁴⁸ "La visite de M. Lipkowski", *Le Devoir*, Montreal, October 11, 1969.

⁴⁹ "Pourquoi Paris serait-il plus québécois que les Québécois?" *Le Monde*, Paris, October 12 and 13, 1969.

⁵⁰ "De Lipkowski, Le ministre français fait état de 'l'utilité incontestée' d'un satellite franco-québécois", *Le Devoir*, Montreal, October 15, 1969; "Claims space pact agreed", *The Montreal Star*, October 15, 1969.

⁵¹ *Le Devoir*, *ibid.*; *The Montreal Star*, *ibid.*

constitutional powers between Ottawa and Quebec. Prime Minister Trudeau also announced that he was asking the French government for an official French interpretation of the "umbrella agreement" and its relation to visits by French ministers to Quebec; and Mr. Trudeau indicated that if the Paris interpretation of the "umbrella agreement" did not accord with Ottawa's, the Canadian government would have either to change the "umbrella agreement" or to denounce it. At the same time Mr. Trudeau seemed to try to downgrade the importance of this latest clash between Ottawa and Paris by denying that M. de Lipkowski was either "an important minister or an important person"; and Mr. Trudeau also made it clear that Ottawa would insist in future that any visits by French ministers to Canada be cleared in advance with Ottawa, and that when an invitation was issued to a French minister by the federal government to visit Ottawa he would be expected to accept.⁵²

In reply, however, French Foreign Minister Maurice Schumann insisted that the de Lipkowski visit fell within the framework of bilateral relations between France and Quebec which had been approved by Ottawa.⁵³

On October 14, it was announced that another French junior minister, Dr. Joseph Comiti, the Secretary of State for Youth and Sports, would visit Quebec on October 15, without at the same time visiting Ottawa.⁵⁴ At the same time, what editorialist, Paul Sauriol, has called "this Byzantine quarrel" between Ottawa on the one hand and Quebec and France on the other⁵⁵ became a little more complicated with the revelation that the province of British Columbia was itself preparing to open direct relationships with France in the economic, business, and financial spheres, to encourage large-scale French investment in that province.⁵⁶ With speculation by the English-language press that President Pompidou had himself intervened to instruct M. de Lipkowski not to go to Ottawa,⁵⁷ perhaps the real history of this latest *opéra bouffe* episode is along the lines of the original speculation in *Le Devoir*, that Ottawa had reacted with too much public glee or *éclat* to Premier Bertrand's message to

⁵² "P.M. threatens rebuke to France on policy", *The Gazette*, Montreal, October 16, 1969; "Settlement is sought to 'visits' arguments", *The Montreal Star*, October 16, 1969; "M. Trudeau s'élève contre 'l'insolence' de M. de Lipkowski", *Le Devoir*, Montreal, October 16, 1969.

⁵³ *The Gazette*, Montreal, *ibid.*; *The Montreal Star*, *ibid.*

⁵⁴ "Another French official to avoid Ottawa", *The Montreal Star*, October 14, 1969; "Ottawa bypassed again. French official arrives here", *The Gazette*, Montreal, October 16, 1969; "French official due here today", *The Montreal Star*, October 15, 1969.

⁵⁵ *Le Devoir*, Montreal, October 11, 1969.

⁵⁶ Editorial, "Foreign Affairs. B.C. in France", *The Vancouver Province*, republished in *The Gazette*, Montreal, October 16, 1969.

⁵⁷ "Pompidou intervened", *The Gazette*, Montreal, October 17, 1969.

President Pompidou in July, Ottawa insisting on treating the new Quebec-Paris policy of restraint and moderation as an Ottawa triumph over Quebec aspirations, thereby offending French susceptibilities and inciting, in turn, a fresh Paris reaction.⁵⁸ On the other hand, the editor of *Le Devoir*, Claude Ryan, was inclined to suspect hidden intentions behind the Ottawa invitation to M. de Lipkowski — specifically that Ottawa had sought to profit by a visit of M. de Lipkowski to Ottawa to assert the principle that whoever wants to come to terms with Canada can only do so through Ottawa. Mr. Ryan referred here to rumours to the effect that that had been the attitude of the federal government on the occasion of several recent visits to Ottawa by other political figures from abroad (presumably the recent visitors from Francophonic Africa), and continued:

A supposer que cela soit vrai, qu' [Ottawa] aurait cherché à profiter du voyage de M. de Lipkowski pour tenter d'accréditer définitivement sa "théorie du chapeau" auprès de Paris, on comprend que le ministre français ait voulu être prudent et ait préféré décliner l'invitation. Le genre de problème qu'Ottawa aurait alors voulu régler est un problème qui regarde les Canadiens et doit se régler entre Canadiens. Le gouvernement français, n'ayant pas les mêmes besoins immédiats que certains gouvernements africains, pouvait se permettre, à cet égard, plus d'indépendance sans nécessairement verser dans la grossièreté. Il y avait d'ailleurs, dans l'insistance que mettait Ottawa à recevoir M. de Lipkowski, quelque chose qui incitait à la prudence. Ce n'est pas la diplomatie française qu'on pourra reprocher de manquer d'intuition en ces matières.⁵⁹

The *New York Times* now entered the act to try to link M. de Lipkowski's visit to what it called General de Gaulle's "wicked effort to help subvert and dismember Canada".⁶⁰ At the same time the two leading English-language dailies in Quebec published stories attributed to "French Government sources" to the effect that Canada had attempted to use blackmail against the French government to force a senior French official to visit Ottawa, during the summer. According to the *Montreal Gazette* story, the French government asserted that the second-in-command in the Canadian Embassy in Paris, Elden Black, had warned the French government that he would give the Canadian Embassy's dossier on Franco-Canadian relations to the Opposition presidential candidate, Alain Poher, to use against M. Pompidou in the presidential campaign, unless the director-general of cultural, scientific, and technical relations,

⁵⁸ Paul Sauriol, "La visite de M. de Lipkowski", *Le Devoir*, Montreal, October 11, 1969.

⁵⁹ Claude Ryan, "Après le passage de M. de Lipkowski", *Le Devoir*, Montreal, October 17, 1969.

⁶⁰ Editorial, "French Meddling in Quebec", *New York Times*, October 21, 1969.

in the French Foreign Ministry, Pierre Laurent, also visited Ottawa during the course of a scheduled three-day visit to Quebec in June 1969. This assertion was reported as being denied by Ottawa.⁶¹

The Montreal Star, repeating the same story, said that the same French government source alleged that the incident had angered President Pompidou when he finally heard of it, and that it was an

... important factor in the decision not to send junior Foreign Affairs Minister Jean de Lipkowski to Ottawa. . . . France had decided to take a more normal approach to its relations with Ottawa and . . . the alleged incident "played a major rôle" in the return to the Gaullist style which has provoked the ire of Prime Minister Trudeau. . . . France complained to Ottawa a couple of weeks after the alleged incident which they qualified as "open blackmail". . . .

The whole story was reported as being denied by Ottawa.⁶²

At the same time, *Le Devoir*, which signally omitted to carry the "blackmail" story, reported the French government reaction to the Canadian government's official note on the de Lipkowski visit as being that the note was "unexpected and linked to internal problems of Canada which do not concern us and in which we have no intention of meddling".

Le Devoir praised Canada's External Affairs Minister Mitchell Sharp as being conciliatory and moderate in his approach to France in the whole affair, and as being convinced that the diplomatic difficulties could be overcome. By a singular irony, the person to whom Canadian Ambassador to Paris, Paul Beaulieu, delivered the Canadian government note of complaint to France concerning the de Lipkowski visit was not French Foreign Minister Maurice Schumann, who was reported to be unavailable for the purpose since preparing for a visit to Japan, but the junior Foreign Minister, M. de Lipkowski himself. M. Beaulieu and M. de Lipkowski were reported as having had a long official discussion on the problem posed by the journeys of French Ministers to Quebec. As *Le Devoir* concluded:

Dans les milieux autorisés de la capitale canadienne, aucune signification particulière n'est attachée au fait que l'ambassadeur Beaulieu n'a été reçu finalement que par le ministre qui est lui-même au centre de la controverse. On ne pense pas que les autorités françaises aient voulu, par là, imposer au diplomate canadien un entretien avec une personnalité que M. Trudeau a qualifiée de "peu importante,"⁶³

⁶¹ "French accusation of blackmail denied", *The Gazette*, Montreal, October 25, 1969.

⁶² "Ottawa denies Paris claim", *The Montreal Star*, October 25, 1969.

⁶³ "Vue de Paris. 'La note canadienne paraît inattendue et liée à des problèmes intérieurs'", *Le Devoir*, Montreal, October 23, 1969.

Apparently, the final resolution of the de Lipkowski affair would have to wait upon the return of the French Foreign Minister, Mr. Schumann, from his projected visit to Japan. The fact that the French government took this approach, and that the Canadian government did not seem particularly to object to the resulting delay,⁶⁴ suggested that both governments had decided to try to make an ally of time and to take advantage of the resultant "breathing spell" with a view to de-escalating the whole problem.

On his return to Paris, the French Foreign Minister, M. Schumann, made a statement before the French National Assembly, on November 4, 1969:

The visit made by M. de Lipkowski . . . is a question, pure and simple, of a routine — I might even say daily — application of the Franco-Quebec agreements, dating from February 27 and November 4, 1965, agreements, which — the Assembly and the country must know — were approved by the Canadian Federal Government in an exchange of Franco-Canadian letters of those dates.

We have thus, purely and simply applied what is just regular procedure and which, consequently, should never have created a scandal.

. . . By virtue of the letter and the spirit of the Franco-Quebec agreements — I insist on repeating — approved in the beginning by the Federal Government, we do not consider that every visit to Quebec must automatically involve a visit to the Federal Capital.

But, inversely, we do not consider that Ottawa is in any way — to repeat the expression used, and even abused, by certain elements of the press — a forbidden city. . . . The proof of this is, in fact, that an eminent member of the Government, Mr. René Plevin, Keeper of the Seals (Minister of Justice) paid a visit to Ottawa on the occasion of the Conference of the French-Language International Law Institute, and I need hardly say, with the full approbation of the French Government to which he reported in the Council of Ministers.⁶⁵

Public attention now shifted back to Ottawa for the latest skirmish. The influential left-wing Paris journal, *Le Nouvel Observateur*, speculated that Prime Minister Trudeau had personally intervened to veto a luncheon invitation from the U.N. Secretary-General, U Thant, to the French Ambassador to the United Nations, on the occasion of a visit by Mr. Trudeau to the United Nations, in early November, Mr. Trudeau thus seeking to obtain his revenge on France over the de Lipkowski affair. As *Le Nouvel Observateur* continued:

⁶⁴ *Le Devoir*, *ibid.*

⁶⁵ Text of a declaration made by the Minister of Foreign Affairs, Mr. Maurice Schumann, before the French National Assembly, on November 4, 1969. Ambassade de France, Ottawa, 1969.

Quand on connaît Pierre Trudeau, c'est une information qui ne surprend nullement. Dynamique, truculent, haut en couleur, il a de plus son franc parler.⁶⁶

Le Devoir of Montreal, commenting on this latest development, noted that it is the practice at the United Nations, in the case of luncheons given by the U.N. Secretary-General in honour of distinguished visitors to the United Nations — as with U Thant's luncheon in honour of Mr. Trudeau, on the occasion of his visit to the U.N. — to draw up the list of luncheon guests in consultation with the guest of honour. *Le Devoir* reported, however, that the federal government in Ottawa denied that Mr. Trudeau had been concerned with the invitation list.⁶⁷

By now, it was hardly possible to avoid the conclusion that an undue amount of time and energy had been invested by all three capitals — Ottawa, Quebec, and Paris — in an affair of disproportionately slight social value; and that, whatever issues of constitutional principle may have been involved at the beginning, the war had now become trivial and farcical, degenerating (in the language of the French children's classic) into a veritable *guerre des boutons* from which no one of the parties could now emerge with much political profit or advantage.

All parties appear finally to have recognized this fact, for the *de Lipkowski* affair now seemed to end as suddenly as it had begun. The French government apparently decided quietly to ignore the Ottawa protest note over the *de Lipkowski* affair, and Ottawa, in turn, apparently decided quietly to ignore the French government's ignoring of its protest note; and the Quebec government, for its part, chose not to involve itself further, publicly, in this latest Ottawa-Paris conflict.

On the occasion of the NATO Council meeting in Brussels, on December 4, 1969, federal External Affairs Minister Mitchell Sharp and French Foreign Minister Maurice Schumann had a long private discussion at which they apparently agreed to try to avoid similar incidents in the future, as between Ottawa and Paris.⁶⁸

Federal External Affairs Minister Sharp had already, one week earlier, been able to announce an agreement, between Ottawa and Quebec Premier Jean-Jacques Bertrand, whereby the Quebec junior Minister for Education, M. Jean-Marie Morin, would simultaneously head both a Quebec provincial delegation and also the Canadian delega-

⁶⁶ "M. de Lipkowski maltraité", *Le Nouvel Observateur*, Paris, November 17, 1969.

⁶⁷ "Au déjeuner de M. Thant. L'absence de la France a été très remarquée", *Le Devoir*, Montreal, November 18, 1969. And see also, "Trudeau didn't snub France, Canadian government says", *The Montreal Star*, November 18, 1969.

⁶⁸ "Canada, France agree to 'bury the hatchet'", *The Gazette*, Montreal, December 5, 1969; "France-Canada: Contentieux en voie de règlement", *Le Devoir*, Montreal, December 6, 1969; "Paris-Ottawa relations thaw", *The Montreal Star*, December 6, 1969.

tion, at the resumed conference of the Education Ministers of French-speaking countries, to be held in Paris from December 1-3, 1969, the agreement including provision for using the Quebec flag on M. Morin's desk in the conference room, but with the Canadian flag also "prominently displayed". This agreement also stipulated that "the same flag protocol" be followed on the car carrying the Canadian delegation to and from the conference, with special permission for the Quebec flag to fly over the hotel where the Canadian delegation was staying for the conference.⁶⁹

Everything thus pointed finally to a polite and essentially pragmatic accommodation among the three parties — Ottawa, Quebec, and Paris — reflecting at once the commonsense and moderation of their principal spokesmen in recent weeks, federal External Affairs Minister Sharp, Quebec Premier Bertrand, and French Foreign Minister Schumann. It remained to be seen whether the new emphasis on cooperative federalism in the solution of this particular problem in its Canadian constitutional aspects would stop right there; or whether it could be extended also to other current tension-issues of federal-provincial relations in Canada.

On the whole the apparent slow, quiet trend towards an Ottawa-Quebec-Paris accommodation was maintained right up to the time of the Quebec Provincial elections on April 29, 1970, which saw the defeat of Premier Bertrand's government by the Quebec Provincial Liberals, led by Robert Bourassa. Some bizarre events continued to occur, however, during that time.

Thus Prime Minister Trudeau flew to Courchevel, France, for a skiing holiday at Christmas 1969, but signally failed to call on President Pompidou during the visit. ("P.M. hints legal marijuana", *The Gazette*, Montreal, January 9, 1970.)

French junior Foreign Minister, Jean de Lipkowski, returned to the firing line to comment, variously, that "Ottawa's protest over the conduct of [M. de Lipkowski's] Quebec visit last fall was an attempt to 'intimidate' the French and Quebec governments"; that "there had been no [Ottawa-Paris] difficulties while former Prime Minister Lester B. Pearson was in power"; that "it was not his [M. de Lipkowski's] decision, or whim, to refuse Ottawa's invitation last fall, but rather 'the decision of the French government' "; that "I didn't say a word about the Canadian constitution."⁷⁰

⁶⁹ "Bertrand avoids rift on Paris conference", *The Gazette*, Montreal, November 26, 1969; "Conférence sur l'éducation à Paris: Jean-Marie Morin dirigera la délégation Canadienne", *Le Devoir*, Montreal, November 26, 1969.

⁷⁰ "M. de Lipkowski revisited: Says Quebec fact re-inforced by cooperation with France." *The Gazette*, Montreal, January 14, 1970.

There was apparently a further, direct invitation (on the Gabonese model) to Quebec, which did not proceed through Ottawa, this time the invitation coming from Mauritania.⁷¹

Again, a new war of protocol between Ottawa and Quebec threatened, concerning Quebec participation in the founding of the *Agence de coopération culturelle et technique des pays francophones*, to be held in Niamey in March 1970. The blows and counter-blows are best summed up in the colourful newspaper headlines:

"A la conférence de Niamey. La participation du Québec devra être clairement identifiée, affirme M. Bertrand", *Le Devoir*, Montreal, January 29, 1970;

"Pour éviter d'aller seul à Niamey, Ottawa serait prêt à faire des concessions à Bertrand", *Le Devoir*, Montreal, March 12, 1970;

"Ottawa cède. Québec signera à Niamey le traité de fondation de l'Agence francophone", *Le Devoir*, Montreal, March 13, 1970;

"La conférence de Niamey. Masse crie victoire: Trudeau dit que toute province affichera son drapeau", *Le Devoir*, Montreal, March 14, 1970;

"Confusion à Niamey. Le contre-projet français réjouit Québec mais 'surprend' Ottawa", *Le Devoir*, Montreal, March 17, 1970;

"A la recherche d'un compromis à Niamey. L'affrontement Paris-Ottawa met en péril la naissance de l'Agence", *Le Devoir*, Montreal, March 18, 1970;

"Malgré un projet de compromis à Niamey, le triangle Ottawa-Paris-Québec fait face à de nouveaux obstacles", *Le Devoir*, Montreal, March 19, 1970.

"Niamey. Ottawa accepte une formule de compromis", *Le Devoir*, Montreal, March 20, 1970;

"L'accord est signé à Niamey. Ottawa crie victoire; Québec est satisfait", *Le Devoir*, Montreal, March 21, 1970;

"La solution de Niamey. C'est ce que Québec voulait dès le début", *Le Devoir*, Montreal, March 21, 1970;

"Niamey hassle 'settled'", *The Montreal Star*, Montreal, March 20, 1970;

"Pact prevented Ottawa withdrawal", *The Montreal Star*, Montreal, March 20, 1970;

"Francophonie: Ottawa view is accepted", *The Gazette*, Montreal, March 21, 1970;

"Who won? Who lost? Well, that depends . . .", *The Gazette*, Montreal, March 21, 1970;

"La conférence de Niamey: succes limité mais réel", *Le Devoir*, Montreal, March 21, 1970;

⁷¹ "Un 2e Gabon? La Mauritanie aurait invité le Québec sans passer par Ottawa", *Le Devoir*, Montreal, January 28, 1970.

"Ni victoire ni défaite à Niamey . . . Mais un précédent que satisfait le Québec et convient à Ottawa", *Le Devoir*, Montréal, March 23, 1970.

With everyone now seemingly intent on carrying on a war of newspaper headlines, and issuing almost daily press statements loudly proclaiming "victory", perhaps the best summation of the final resolution of this second Niamey "crisis" is contained in Southey's well-known lines from the schoolboy's poetry anthology:

And everybody praised the Duke who this
 great fight did win.
'But what good came of it at last?' quoth
 little Peterkin.
'Why, that I cannot tell', said he,
'But 'twas a famous victory'.
 Southey, *The Battle of*
 Blenheim (1798)

That the second Niamey conference may, however, have been in the nature of the last storm, preceding a final calm (and this even without the change of government following the Quebec provincial elections of April 29, 1970), was hinted at in the apparently happy progress, at the personal level, of direct exchanges between French Foreign Minister Maurice Schumann, Canadian External Affairs Minister Mitchell Sharp, and Premier Bertrand.⁷²

⁷² "Le triangle Paris-Québec-Ottawa. La visite de Sharp amenuiserait le contentieux avec la France", *Le Devoir*, Montréal, February 7, 1970; "Met at airport by Schumann, Sharp's French visit off to good start", *The Gazette*, Montréal, April 4, 1970; "Vers une meilleure compréhension, Schumann accueille Sharp à Paris." *Le Devoir*, Montréal, April 2, 1970; "Les entretiens Sharp-Schumann le début de bonne relations?", *Le Devoir*, Montréal, April 10, 1970.

Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism

Ronald G. Atkey

Introduction

The internal problems of the external relations of a federal state like Canada centre around the basic issue: Should the power to conduct international relations be lodged in the federation exclusively, or should the component units have some of this power? If the latter, a supplementary issue concerns a delimitation of that power in the component units and the extent of federal supervision, if any.

The role of the various provinces in the Canadian federation has been undergoing significant changes in recent years. One does not have to be an astute political observer to note the trend which has given the provinces, whether by choice or otherwise, a greater responsibility in the exercise of governmental powers. The reasons for this trend have been the subject of prolific comment and intellectual discussion elsewhere, and require no extensive reiteration here. The subject of international activity by the Canadian provinces, however, presents a matter of special interest in this context; for at stake is not only the internal maintenance of the Canadian federation, but the position of the federation in the international community. This is one of the reasons why this matter has received such widespread attention in recent years both inside and outside Canada.

At the outset, let me make three preliminary comments as to my approach in this paper. First, it is my view that the issue should not be decided in the abstract by the *holus bolus* adoption of a model from another federal country, or through a wholesale refuge-taking in traditional constitutional doctrines of Canadian and British judges prescribed for another age. Second, any proposed solution must attempt to provide

on a functional basis for some external projection of legitimate provincial domestic activities, taking into account both the demands of an increasingly interdependent world and the very real diversities in Canada of language, culture, wealth, and geography. Third, and most important, this issue should be approached from the viewpoint that Canada must remain a united federal country, prepared to allow citizens of all provinces to partake in the benefits of international relations in the manner which best suits their particular aims and desires within the federation.

It is appropriate at this point to set forth a concept of Canadian federalism which will serve as the fundamental premise from which recommendations herein will flow. Federalism is a political method of distributing governmental functions between a central government and governments of the component units of the federation, generally on the basis of a "national" or "local" characterization of each such function. Federalism is not centralism; nor is it decentralism. It is a political equilibrium or ideal which can exist on its own. In Canada, there is a tendency to confuse centralism with federalism. Those who refuse to perceive or acknowledge the distinction fail to appreciate the complexities and diversities of the nation. Canada could not be governed centrally in 1867, nor can it be now; that is why it is federal. And a century of experience in the art of federalism has brought the nation to the point where it is no longer acceptable to regard the concept merely as a temporary inconvenience to be suffered by the champions of a unitary state, or as a political sop to soothe the frustrations of an ethnic minority. Federalism is a positive political value in Canada, only to be perfected by the application of sound and imaginative techniques by both levels of government.¹ The approach recommended here in succeeding pages might be one such technique.

Finally, it must be stated that the analysis and recommendations which follow are merely an approach to this particular problem of Canadian federalism, and in no way purport to be a final solution or exhaustive of the subject.

The Rationale of Provincial Claims to International Competence: Aspects of Canadian Federalism

What would Canada gain from direct participation by the provinces in international relations? Wouldn't it be more convenient, if not proper, for all international power to be vested exclusively in the federal govern-

¹ See Peter Russell, *Constitutional Reform of the Canadian Judiciary*, 7 *Alta. L. Rev.* 103, 118-119 (1969).

ment? After all, the traditional areas of international relations such as defence and diplomacy are already the exclusive jurisdiction of the federal government, so why not all other areas? This section attempts to set forth some direct answers to these queries, giving some idea of the rationale behind general provincial claims to international competence and citing specific examples where certain provinces, Ontario in particular, have already assumed a degree of competence.

In the first instance, the skills, knowledge, and resources required for some types of Canadian international activity are found only in provincial government departments. Provincial departments of education are the most notable examples in this respect, although other departments such as hydro-electric power, tourism, and lands and forests also must be considered. It is often more convenient and practical simply for a particular province to enter into direct relationships with a foreign government or agency in these fields of exclusive provincial jurisdiction, rather than unnecessarily to interpose another level of governmental bureaucracy not as closely attuned to provincial needs.

In addition, there are dangers of assuming some absolute benefit in maintaining uniformity and universality in all international governmental programs through the vesting of all international powers exclusively in the federal government. Each province may have different financial or social priorities in matters within its constitutional jurisdiction. Yet these priorities might be thwarted if the federal government committed itself internationally to a contrary course of action without at least consulting the provinces; and the provinces might later be less able to refuse to implement the program once presented with a federal *fait accompli*. In some provincial fields, it might seem more practical merely to allow the provinces to establish the international relationships themselves, as long as there were no conflict with national interests.

Canada's international relationships must also reflect the bilingual and bicultural character of the nation. Quebec has always been a bilingual province. Already New Brunswick and Ontario have made provision for bilingual governmental services and the right to be educated in English or French, and further bilingual developments are anticipated. These three provinces, although not exclusive in this respect, have a particular and intense interest in the development of and participation in "la francophonie" as the expression of the linguistic and cultural heritage common to the French-speaking world. The interest of some of the other provinces such as British Columbia and Newfoundland understandably is not as great. Therefore it seems feasible that individual provinces should establish some international relationships in this respect, to the extent that each provincial government deems necessary.

This is not to say that the federal government has not a primary obligation to develop "la francophonie" through the Department of External Affairs and through its External Aid Office and Cultural Affairs Branch. Indeed, this federal participation is essential if full expression is to be given abroad to Canada's bilingual and bicultural heritage, and if all Canadians at home are to benefit from such international linguistic and cultural contacts and exchanges. But there is no practical reason why the federal government should monopolize this field internationally, except to the extent that a national coordinated policy is necessary in some particular types of programs. The provinces have differing priorities in this field, and provincial participation abroad is the most practical way of giving expression to these priorities. The direct interposition of another level of government in all cases would seem to be emphasizing form at the expense of substance, and might stifle some potentially valuable programs which are initiated through delicate personal relationships and informal contacts between provincial and foreign officials. As long as there is a full and honest disclosure of the provincial activity to the federal government and as long as no national interests are jeopardized, there can be no real objection to this multilateral and more intense Canadian involvement in "la francophonie". The benefit is a greater degree of linguistic and cultural enrichment for a great many Canadians.

The provinces' special responsibility for education, as a key provision in the British North America Act and as a permanently established fact, is worthy of mention here. There is no subject matter of legislative jurisdiction which more directly affects and alters the lives of the Canadian people. Throughout the world, the field of education today is in the midst of dynamic change with respect to such matters as method, curriculum, instructional aids, and physical facilities. No longer can each province ignore educational developments in other countries if it is to adequately discharge its constitutional obligation. Neither can it pass by opportunities to share its existing educational expertise with other developing countries.

Ontario has already assumed a limited degree of international competence in this field with respect to both providing educational aid to underdeveloped countries and enriching education experiences of Ontario students through cultural exposure to foreign teachers and students. For example, as early as 1941 there was an exchange of letters between the Ontario Minister of Education and the Director of Education for Bermuda arranging for the training in Ontario of public school teachers from Bermuda. At the time, it was not thought necessary to inform the federal government of the arrangement. Since 1941 over 300 Bermudian

teachers have received Ontario training under the arrangement.² In 1968, project "School-to-School" was initiated by Ontario with a number of islands in the West Indies for the twinning of Ontario schools with schools there. The project was designed by the Ontario Department of Education to provide Ontario and West Indian students with a positive approach to social studies through communication by letters, photographs, art projects, taped messages, and so on and thus to provide such students with a broader understanding of the racial and cultural differences existing between peoples of the world. To date, over 500 Ontario classrooms have been twinned.³ Ontario has provided technical assistance to the Bahamas on a number of educational and architectural projects since 1967, and has made arrangements for the provision of classroom furniture, textbooks, hospital supplies, and related items by local Ontario school boards to a number of West Indian islands under a program called "Operation School Supplies" commenced in 1965. In 1967, at the request of the Premier of the Bahamas, the Director of the Educational Television Branch of the Ontario Department of Education was sent to the Bahamas to conduct an investigation into the feasibility and practicality of a Bahamas ETV network. And on two recent occasions, officials of the Department have met with education officials, teachers, and students of the British Virgin Islands to discuss Ontario's continuing role with respect to loaning specialist teachers and establishing various trades training departments. All these examples appear merely to be legitimate efforts by a province to project externally certain activities within its proper domestic sphere of jurisdiction.

The international activities of the Province of Quebec in the field of education are much more extensive and well known than those of Ontario. Apart from the question of the propriety of the form and manner in which some of these activities have recently been conducted (about which more will be said later in this paper), it should be noted that

² The information concerning the arrangement in Ontario for the training of Bermudian teachers was obtained from G. L. Woodruff, Director of the Teacher Education Branch of the Ontario Department of Education. It forms part of a departmental survey of the Ontario government conducted by the writer in June and July of 1968 to determine practices respecting international arrangements and/or agreements. Hereafter, the survey will be cited as *Ontario Government Departmental Survey, 1968*.

³ The information concerning "Project School-to-School", and the remaining information in this paragraph was contained originally in a report entitled *External Aid Program: Department of Education* prepared by George Mason, Director of the Information Branch of the Ontario Department of Education in April 1968. An abridged version of the report was included in the *Ontario Government Departmental Survey, 1968*. It was not indicated in the report to what extent, if any, the various projects outlined above were carried out in cooperation with the External Aid Office of the Department of External Affairs in Ottawa.

Quebec since 1964 has sponsored a significant number of educational, technical, and cultural exchanges with France and French-speaking African countries in which several thousand Quebec, French, and African students, teachers, and officials have benefited from the cross-fertilization fostered by such programs. The nature and extent of these programs was recently described in the *Working Paper on Foreign Relations* prepared by the Quebec Delegation and submitted by Premier Bertrand to the Constitutional Conference on February 5, 1969.

Even the federal government, in its White Paper on *Federalism and International Conferences on Education* released in May 1968, while disagreeing with the concept of separate provincial delegations favoured by Quebec, suggested that Canadian delegations to such conferences should normally be headed by provincial ministers, should include ministers of education or officials of interested provinces, and should follow positions on educational matters decided by provincial governments or by the Council of Ministers of Education. Again, this is recognition of the fact that it is the provinces which are functionally equipped to participate in this type of activity.

Geography has determined the nature of many political and social relationships within Canada. It has also made north-south international relationships between the Canadian provinces and bordering states of the United States of America appear to be a natural phenomenon in view of the coordinated governmental action required to meet joint problems. Common waterways, similar social and economic problems, and an open border are conditions which have already fostered numerous agreements between the provinces and adjacent states. International relationships of a regional nature have thus been clearly established, and it would seem highly impractical for the federal government to be interposed into these situations in the absence of any overriding national interest.

For example, Ontario is a member of an organization called the Northern Great Lakes Area Council (NORGLAC) established in 1945 and comprised of the states of Minnesota, Wisconsin, and Michigan and the province of Ontario. The purpose of the organization is to promote travel in the Great Lakes region, and to undertake joint advertising programs and related activities. Ontario's activities in this respect are independent of the federal government.⁴ Also, the departments of transport and highways for Ontario,⁵ Saskatchewan,⁶ Alberta, Manitoba, and Nova

⁴ Information reported by A. S. Bray, Deputy Minister of Tourism and Information and included in the *Ontario Government Departmental Survey, 1968*.

⁵ Information reported by R. H. Humphries, Executive Director of Services, and D. F. Morrison, Solicitor, both of the Ontario Department of Transport, and included in the *Ontario Government Departmental Survey, 1968*.

⁶ Information concerning the international activities of provinces other than Ontario

Scotia all report having made some type of arrangement with various U.S. states for reciprocal recognition of driver's licences and commercial vehicle licences and registration, with no direct involvement by Ottawa. The province of Manitoba reports having concluded on its own an agreement through its Water Supply Board with the city of Neche, North Dakota for the supply of potable water to the Board by the city for use in water distribution systems of several Manitoba villages.⁷ Finally, a number of provinces have independently made arrangements with bordering states relating to mutual assistance in the case of large forest fires occurring adjacent to the national boundary.⁸

Provincial participation in international activity can be justified as well on the basis of geographical proximity for purposes of trade relationships. British Columbia's trade and economic activities with Japan have developed largely as a result of the mutual geographic convenience of shipping and air transport. Nova Scotia has established trade relationships with Sweden and France for similar reasons. The exploitation of geographical proximity for trade purposes might be significantly impeded if the provinces were excluded from such relationships.

The southward economic and cultural pull of continentalism is also a factor to be considered. On the one hand, it might be suggested that the vesting of international power exclusively in the federal government will foster a strong, independent Canadian foreign policy geared to withstand this pull. On the other hand, there is strength in fostering a diversity of extracontinental relationships. Ontario has already established educational and cultural relationships with the West Indies, Quebec with France and several West African countries; British Columbia has economic relationships with Japan. Rather than decreasing the Canadian resistance against political and economic absorption by the United States, these provincial international relationships have strengthened that resistance, through the fostering of international diversity. Further provincial initiatives of this sort might well increase it.

Finally, one should note the shifting expectations within the federation and throughout the world of Canada's role in the international

was obtained through a letter survey of provincial governments conducted by the writer in June and July of 1968 to determine departmental practices respecting international arrangements and/or agreements. Hereafter, the survey will be cited as the *Survey of Provincial Departmental Practices, 1968*.

⁷ Information reported by D. R. C. Bedson, Clerk of the Executive Council, and included in the *Survey of Provincial Departmental Practices, 1968*.

⁸ In the case of Ontario, a written agreement was entered into in 1942 with the state of Minnesota. This agreement is included in the *Ontario Government Departmental Survey, 1968*. In the case of Manitoba, there was an exchange of letters with Minnesota. In the case of Alberta, there was merely an informal arrangement with bordering states.

community. No longer can Canada viably claim to be the international peace-keeper which she claimed to be in the two decades following the Second World War, or the diplomatic buffer between Washington and London in the western power spectrum. Her international role would seem to be more in the realm of substantive commitments of capital, technology, and health services to underdeveloped countries, and active participation in matters of immigration and world trade. These are matters in which the provinces have a direct interest and competence, and are vitally concerned. Accordingly, the necessity of provincial involvement in the international relationships resulting therefrom should be readily apparent.

The Legal Arguments

From time to time, legal arguments based on the British North America Act or on constitutional and international custom and practice have been made by both proponents and opponents of provincial activity in the international sphere. It is historically and analytically useful to the present discussion to put forward the main arguments on each side for consideration as to their contemporary relevance, legal authority, and political viability. While these arguments are important, one should avoid making the hasty assumption that the basic issue stated in the introduction is capable of a purely legal solution in contemporary Canada.

The legal arguments supporting independent provincial international competence in matters of provincial jurisdiction have been made mostly by persons from the Province of Quebec.⁹ The main argument goes something like this. The British North America Act is silent as to treaty-making. Section 132 of the Act refers merely to implementation of treaties affecting the British Empire, and its force and effect is virtually spent as a result of the *Radio* case.¹⁰ Nowhere in the B.N.A. Act is it

⁹ The following is not a complete list of the sources of the provincial legal arguments, but it gives the main ones: Government of Quebec, *Working Paper on Foreign Relations*, 13-19, submitted to the Constitutional Conference in February 1969; Government of Quebec, *The Government of Quebec and the Constitution*, 71-73, a collection of statements and briefs by the Honourable Daniel Johnson in the period 1966-1968; Jacques-Yvan Morin, *International Law-Treaty-Making Power-Constitutional Law-Position of the Government of Quebec*, 45 Can. B. Rev. 160 (1967); Jacques-Yvan Morin, *La Conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé*, 3 Can. Y.B. Int'l. L. 126 (1963); Paul Gérin-Lajoie, *Federal Position Anachronistic*, article appearing in the *Montreal Star*, March 19, 1968. It should be noted that these arguments are raised in discussion by Gerald Morris in *The Treaty-Making Power: A Canadian Dilemma*, 45 Can. B. Rev. 478 (1967), but they are resoundingly rejected there.

¹⁰ In *re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.).

stated that international relations fall exclusively within the jurisdiction of the federal government. Therefore, it can be implied that the provinces have a legal right to negotiate and sign treaties on provincial subjects, particularly in view of the fact that it has been judicially conceded in the *Labour Conventions* case¹¹ that the provinces have the exclusive right to implement such treaties. In other words, it is contended that treaty-making and treaty-implementation are inseparable, and that if the provinces can legally implement certain treaties they should be able to make them.

In support of this argument, its proponents have usually referred to international law, specifically the final draft codification of the law of treaties prepared in 1966 by the International Law Commission of the United Nations:

Article 5. Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.
2. State members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.¹²

Thus, it is usually argued from this that since Canada's Constitution is silent on the matter, it can be presumed that the provinces have the capacity to conclude treaties as well as the federal government. Additional comfort is generally taken from the experiences of other federal states where component units of the federation have been allowed to

¹¹ *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326 (P.C.).

¹² From 1966 Yearbook of the International Law Commission, Vol. II, pp. 114-115. It should be noted that the International Law Commission's final draft codification of Article 5(2) was rejected by majority vote at the United Nations Conference on the Law of Treaties held in Vienna in April 1969, thus leaving the first subsection as the sole clause relating to capacity of states to conclude treaties. The amended Article became part of the *Vienna Convention on the Law of Treaties*, which was opened for signature on May 23, 1969. Apparently the Canadian delegation to the conference, made up primarily of representatives of the Department of External Affairs, was active in promoting the rejection of subsection 2. With the Article now amended, it would seem that the legal arguments supporting independent provincial international competence can draw little support from this source of international law, unless one were to accept the argument that the Canadian provinces are "states" within subsection 1 (a position which would appear to be untenable in the light of the various definitions in Article 2 of the *Vienna Convention* and international practice). Indeed, Jean-Pierre Goyer, Parliamentary Secretary to the Secretary of State for External Affairs, stated in the House of Commons on October 30, 1969 that Article 5(2) of the draft certification was rejected because, *inter alia*, it did not expressly reaffirm the exclusive right of the federal state to interpret its own constitution for the guidance of other states. He also noted that the Vienna conference had concluded that the adoption of such a clause would have been tantamount to an invitation to foreign states to give their own interpretation of the constitution of the federal states, and this would have constituted undue interference with the internal affairs of such states.

make treaties: Switzerland, the Federal Republic of Germany, and the U.S.S.R.¹³

Finally, the proponents of the argument might refer to recent precedents set by the Province of Quebec as establishing provincial competence to make international agreements through constitutional custom and practice. For example, Quebec entered into an educational exchange agreement (called a "procès verbal") with France in 1964. Although the federal government eventually gave its consent to the agreement by means of an exchange of letters between the French Ambassador and the Secretary of State for External Affairs in February 1965, the original agreement was initiated by Quebec alone and was implemented by Quebec officials. Later in 1965 another precedent was set. On November 17 Canada and France signed a cultural agreement and arranged an exchange of letters between External Affairs Minister Paul Martin and the French Ambassador recognizing possible ententes providing for educational and cultural exchanges between France and the provinces of Canada. A province could conclude ententes under the new federal "umbrella" by making reference to the initial Canada-France agreement or exchange of letters, or by the assent of the federal government. Then, on November 24, 1965, Quebec and France concluded an entente on cultural cooperation which was signed in Quebec City by the French Ambassador and the Quebec Minister of Cultural Affairs. No reference was made by Quebec or France on November 24 to the November 17 Canada-France agreement or exchange of letters. On the same day, however, there was another hasty exchange of letters between Mr. Martin and the French Ambassador to confirm the assent of the federal government to the Quebec-France entente.

As a result of these and other more recent Quebec precedents, proponents of the provincial legal argument might well suggest that a de facto provincial competence in the international sphere is slowly being created by evolution. Admittedly, the above two provincial initiatives eventually came under the authority of the federal government's exchange of letters. But it might well be the case that provinces in the future could enter into international agreements on their own with the reasonable expectation that Ottawa, once informed, would concurrently or retroactively provide the sanctioning "umbrella".

In summary, then, the main provincial legal argument is based on the silence of the Constitution as to treaty-making; the exclusive provincial jurisdiction over treaty-implementation on provincial subjects (as

¹³ The relevant provisions of the constitutions of these countries and the practices thereunder are conveniently set forth in an Annex to the federal government's White Paper, *Federalism And International Relations*, released in February 1968.

established by judicial precedent) and its logical relationship with treaty-making; the rules of international law relating to legal capacity of member states of a federation; the experiences of other federal states; and constitutional custom and practice as established by recent precedents set primarily by the Province of Quebec.

A second provincial legal argument relating to the powers of the Lieutenant Governor should be noted here, although it is much less tenable than the first. Treaty-making power in Canada is found in the prerogative of the Crown and is not a matter of legislative jurisdiction. The royal prerogative, it is argued, exists in both the federal government (exercised by the Governor General) and in the provinces (exercised by the Lieutenant Governor), and it can be thus implied that the prerogative is apportioned in a manner corresponding to the apportionment of legislative powers.

In support of this argument, reference is usually made to the case in 1892 of *Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*¹⁴ in which the Judicial Committee of the Privy Council held that provinces were independent and autonomous, with the Lieutenant Governors having all the powers of the royal prerogative necessary for provincial purposes. A second case generally put forward as supporting this argument is *Bonanza Creek Gold Mining Company v. The King*¹⁵ in which Viscount Haldane, also in the Privy Council, stated in 1916:

The effect of . . . the British North America Act is that . . . the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.

The argument proceeds from here to the *Labour Conventions* case,¹⁶ where the same court held in 1937 that the provinces have the exclusive legislative jurisdiction to implement treaties on provincial subjects. Thus, it is argued, if the provinces have the legislative jurisdiction to implement treaties, "executive authority in substance follows . . . legislative powers" (per Viscount Haldane) and the provincial executive should therefore be able to make treaties.

This second argument, of course, is related to the first insofar as they both arise by alleged implication from the British North America Act and from judicial precedent. But it is fraught with some difficulty insofar as it represents an attempt to apply the judicial statements made in the

¹⁴ [1892] A.C. 437 (P.C.).

¹⁵ [1916] 1 A.C. 566, 580 (P.C.).

¹⁶ *Supra*, note 11.

specific internal contexts of the *Maritime Bank* and *Bonanza Creek* cases to the unrelated situation involving external treaty-making powers in the federation. It also is subject to the counter-argument that there was no treaty-making power at all in Canada in 1916 when the *Bonanza Creek* case was decided; that prerogative power was not transferred by Great Britain to Canada until after World War I, when through gradual evolution leading up to the Imperial Conference of 1926, Canada achieved a duly independent sovereign status in the international community.

Another telling counter-argument is that the sole prerogative power devolving to the provinces is, in the words of Viscount Haldane in *Bonanza Creek*, that delegated by the Sovereign "through [the] instrumentality [of the Governor-General] to the Lieutenant-Governors . . . on terms defined in their commissions".¹⁷ A Lieutenant Governor's Commission and Instructions grant him only the following authority:

[T]o do and execute all things to his said command and trust according to the several powers, provisions and directions granted or appointed to him by virtue of [the B.N.A. Act] and of all other Statutes in that behalf.¹⁸

Clearly, these powers, relating exclusively to the constitutional text, contain nothing about treaty-making, and therefore we are back full circle begging the very question which the original argument put in issue.

The main legal argument supporting exclusive federal international competence on all matters¹⁹ is based primarily on the view that the prerogative treaty-making power for Canada was vested exclusively in the Queen in 1867 by virtue of section 9 of the British North America Act, and that only through a gradual process of evolution in the period 1871-1939 did any direct foreign affairs power devolve to Canada to be exer-

¹⁷ *Supra*, note 15, at 580.

¹⁸ See John Saywell, *The Office of Lieutenant Governor*, University of Toronto Press, Toronto, 1957, pp. 281-283.

¹⁹ The following is a list of some of the sources of the arguments for exclusive federal competence made since 1960: the Hon. Paul Martin, *Federalism and International Relations* (1968), and its supplement, the Hon. Mitchell Sharp, *Federalism and International Conferences on Education* (1968); Gerald Morris, *op. cit.*, note 9; Ronald Delisle, "Treaty-making Power in Canada" in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Queen's Printer, Toronto, 1967, p. 117; Bora Laskin, "The Provinces and International Agreements", *ibid.*, p. 103; Michael Rand, *International Agreements Between Canadian Provinces and Foreign States*, 25 U. of T. F. L. Rev. 75 (1967); the Hon. Paul Martin, *The Provinces and Treaty-making Powers*, 17 External Affairs 306 (1965); Ivan Head, *The "New" Federalism in Canada: Some Thoughts on the International Legal Consequences*, 4 Alta. L. Rev. 389 (1966); Ivan Head, *Quebec in Gabon*, article appearing in the *Montreal Star*, March 18, 1968. These arguments are also alluded to in an interesting and thoughtful article by Edward McWhinney, "The Constitutional Competence Within Federal Systems for International Agreements" in Ontario Advisory Committee on Confederation, *op. cit.*, p. 151.

cised solely by the Governor General. This devolution, it is argued, was comprised of various modes of Canadian participation in the Washington Treaty of 1871, the Treaty of Versailles of 1919, the Halibut Fisheries Treaty of 1923, the confirmation of independent treaty-making capacity at the Imperial Conference of 1926, the Statute of Westminster of 1931, and the unmistakably independent declaration of war by Canada on September 10, 1939, one week after the declaration by Britain. At no time during this period, the argument goes, was it ever suggested that the provinces shared any of this treaty-making power.

Further evidence generally marshalled in support of this position is provided by the new Letters Patent issued to the Governor General by the Crown in 1947:

And We do hereby authorize and empower our Governor-General, with the advice of Our Privy Council for Canada of any member thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada . . .²⁰

Also, references are generally made to the *Seals Act, 1939*²¹ in which Parliament provided Canada with its own Great Seal under which "any royal instrument may be issued by and with the authority of His Majesty the King". The British *Seals Act* was amended to correspond with this change, and article 3 of the Governor General's 1947 Letters Patent authorized him "to keep and use Our Great Seal of Canada for sealing all things whatsoever that may be passed under Our Great Seal of Canada".²²

The proponents of the main federal argument have drawn further support from several of the judgements of members of the Supreme Court

²⁰ R.S.C. 1952, Vol. VI at p. 306, para. II.

²¹ Stats. Can. 1939, c. 22.

²² It should be noted that the Government of Quebec, in its recent *Working Paper on Foreign Relations* submitted to the Constitutional Conference in February 1969, challenged the federal argument based on the 1947 Letters Patent on the grounds that the written Constitution (the B.N.A. Act) implied an apportionment of the prerogative corresponding to the apportionment of legislative powers, and that the letters patent could not prevail over the written Constitution. In support of this, they cited the early New Brunswick case of *Doe ex. dem. St. George's Church v. Cogle & Mayes*, (1870) 13 N.B.R. 96, and suggested that any powers of the Governor General which were contrary to the written Constitution would be null and void, particularly if they were powers properly residing in the Lieutenant Governor under the Constitution.

Whether or not this case has any significant bearing on the issue or whether it even applies to powers of the Lieutenant Governor after Confederation, since it was concerned with his powers in 1866, it must be pointed out once again that the Lieutenant Governors do not receive their power directly from the Sovereign but are appointed by the Governor General in Council under the Great Seal of Canada pursuant to section 58 of the British North America Act. Thus, the Lieutenant Governors are mere delegates of the Governor General, and can have no more authority than that given to them by the Governor General.

of Canada in 1936 in the *Labour Conventions*²³ case before it was appealed to the Judicial Committee of the Privy Council. Chief Justice Duff in particular, and also Justices Davis and Kerwin, concluded that the authority to enter into international agreements resided exclusively in the federal government even on matters of provincial legislative competence, and that this position had come about as a result of the "crystallization of constitutional usage and constitutional law". It should be noted, however, that the *Labour Conventions* case was not concerned as much with treaty-making as it was with treaty-implementation, so that the comments of Justices Duff, Davis, and Kerwin were not necessary to the disposition of the matters before the Court. In fact, the Judicial Committee of the Privy Council took this exact position and clearly stated that it wished to express no opinion on the treaty-making issue.

Further judicial comment in accord with the position taken by the Supreme Court Justices was made by Mr. Justice Locke in the 1956 *Scott*²⁴ case in the Supreme Court of Canada; but again this was extraneous to the particular issues before the Court.

Finally, support for the main federal argument is derived from the international law of recognition. Through the series of events from 1871 to 1939 recounted earlier, Canada was gradually "recognized" by other sovereign nations as having an independent international personality and capacity. Recognition came first from Great Britain, of course, largely through the decisions of the Imperial Conference in 1926. Subsequent recognition came from the United States later the same year when letters of credence presented by Canada in Washington were accepted. And international recognition by most of the remaining members of the world community was virtually completed by Canada's independent declarations of war in 1939 and in 1941 when Japan entered the conflict, and by her acceptance to full-fledged membership in the United Nations in 1946. Throughout all this, the proponents of the argument maintain that it was the federal government exclusively, and not the provincial governments, that was recognized as having power over foreign affairs, and that this position has gone unchallenged both domestically and internationally until the past few years.

There is a secondary legal argument for the exclusive federal position, based more on alleged unsatisfactory practical results of provincial international competence than on any legal rule prohibiting it. This argument pertains to the international law of state responsibility. Under international law, it is generally regarded that even if a component unit of a federation has a separate international personality and capacity to

²³ [1936] S.C.R. 461, especially at 496.

²⁴ [1956] S.C.R. 137, 153.

conduct international relations, the central government will still be responsible if the component unit defaults on an international agreement or commits an international tort.²⁵ The leading authority for this proposition is the case involving the lynching of eleven Italians in New Orleans in 1891.²⁶ When the Italian government, pursuant to certain treaty rights, claimed reparation from the Governor of Louisiana and was refused, and a State Grand Jury excused those who had participated in the lynching, the U.S. president intervened and declared that the federal government was responsible according to law; the reparations claim was subsequently paid.

Assuming this to be a firmly established rule of international law, the proponents of the argument then point to the resulting unfairness if Ottawa is to be required to remedy provincial breaches of international agreements over which it has no control. They maintain that the unfairness is not corrected by voluntary undertakings of provinces to accept responsibility. And they insist that if the federal government were to refuse to take responsibility for provincial defaults, this sort of international disclaimer would greatly detract from Canada's international integrity and might result in retaliatory measures by the offended state.

It is further argued that the provinces have no means to back up their international actions: they cannot become parties to an action in the International Court of Justice; they do not possess a recognized diplomatic corps for a peaceful resolution of disputes; nor do they have armed forces for the forceful settlement of crisis situations. And, of course, it is pointed out that most nations are not interested in Canada's domestic political problems anyway, and could not be expected to alter a fundamental rule of international law to accommodate Canada's peculiar problem.

This argument, however, does not take into account some of the practical methods that can be worked out to protect the federal government, such as indemnity agreements, performance bonds, and umbrella agreements. More will be said about these later in this paper. Also, certain types of provincial international arrangements or agreements, particularly those relating to education and culture, carry little likelihood of an international claim even in the event of default. And at least one international law authority, D. P. O'Connell,²⁷ has cast doubt on the

²⁵ See L. F. L. Oppenheim, *International Law*, Vol. 1, Lauterpacht 8th ed., Longman's Green, London, New York, 1955, pp. 339-340; Eduardo Jimenez de Arechaga, "International Responsibility" in *Manual of Public International Law*, Sorensen ed., 1968, pp. 557-558.

²⁶ 6 John Bassett Moore, *Digest of International Law*, 837-841 (U.S. Government Printing Office, Washington, D.C., 1906).

²⁷ See D. P. O'Connell, *International Law*, Stevens, London, 1965, p. 1046.

proposition that the federal government would be responsible in all cases of provincial default. He cites the Canadian case of *Robert Fulton Cutting*,²⁸ in which the federal government in 1938 refused to admit it was responsible under the existing rules of international law for the liabilities of the Province of Quebec in a situation involving that province's failure to return interest on succession duties held by the Canadian courts to be illegally levied against a U.S. national.

These, then, are the main legal arguments on both sides of the treaty-making issue in Canada. It is fair to say that, historically, the arguments favouring exclusive federal competence have been more widely held in Canada by most close observers of the Constitution, and that the arguments favouring independent provincial international competence have been seriously propounded only in recent years, and then primarily by persons from the Province of Quebec. But that is not to say that the provincial legal arguments are without any merit at all, or that they should not be considered in future attempts to work out an acceptable solution to the current issues. What they do illustrate rather clearly is that the problem is largely incapable of a purely legal solution through a court judgement or unilateral executive action, and that a functional approach worked out together by both levels of government is what is really required. The provinces do have a direct interest in the external relationships of the Canadian federation, as was indicated in the previous chapter, and it only remains to devise the formal means to accommodate this interest within the context of a united Canada. Already the federal government has taken steps in this direction through certain proposals and statements of policy contained in its two White Papers released in 1968: the first, entitled *Federalism and International Relations* covering the topic generally, written under the name of the Honourable Paul Martin and released at the Constitutional Conference in February 1968; the second, which was supplemental to the first, entitled *Federalism and International Conferences on Education*, written under the name of the Honourable Mitchell Sharp and released in May 1968. While it is not yet clear whether the federal government's proposals and policies can adequately accommodate the legitimate interests of the provinces, particularly those of Quebec, it is significant that the federal government has not fixed upon any one formula for improvement in existing arrangements but has put forward its views only as a basis for discussion. In fact, it has invited additional comments, suggestions, and proposals on the subject on the condition only that they are consistent with a united Canada.

²⁸ Green Haywood Hackworth, *Digest of International Law*, 561-563 (U.S. Government Printing Office, Washington, D.C., 1943).

The Government of Quebec responded to this invitation with proposals on international agreements, international conferences and organizations, external aid, and consultation mechanisms and constitutional reform, all contained in its *Working Paper on Foreign Relations* submitted to the Constitutional Conference in February 1969. It is hoped that the proposals and general approach recommended in the following section will contribute further to the discussion.

Recommendations: Provincial Activity and a Presumption of Validity

A New Approach

The term "international relations" has traditionally been applied to that formalized activity known as treaty-making. A common approach in discussing the problem of federalism and international relations has been to illustrate the technical distinctions between formal treaties and mere gentlemen's agreements or, colloquially, "non-treaties". Clearly, these types of semantic distinctions are not sufficient in contemporary Canada. The terms, after all, are of no legal significance, just the substance of the actual rights and obligations created. What is required in a meaningful analysis of the problem is really a consideration of the whole range of governmental activity which has direct consequences across state lines. This wide range of activity to be considered should include attendance at international conferences, membership in international organizations, placing or exchanging governmental officials with foreign states, formal and informal agreements, external aid, and even participation in armed hostilities. The term which will be used in the recommendations in this paper to denote the above, in its totality, is "transnational activity".

What, then, should be the approach of the Canadian federation towards the transnational activity of the federal government and of the provinces? In the initial assessment of the problem, it is apparent that there are some types of transnational activity in which only the federal government should be engaged. The rights to declare war or provoke hostilities (*jus belli*), the right to receive and send diplomatic envoys (*jus legationis*), and the right to conclude defence treaties and national trade agreements are all examples of activity which should remain as the exclusive jurisdiction of the federal government. To suggest otherwise would be to deny the very existence of, or the need for, an effective Canadian foreign policy. Canada must have a strong weight in the international community, and it would be unwise to adopt internally a course

of action which would substantially bifurcate or fragment its general foreign policy.

But this position should not necessarily preclude the provinces from directly taking part in certain types of transnational activity within their legislative jurisdictions. For example, provincial activity in the fields of cultural development, social welfare, or economic development does not necessarily become part of Canada's foreign policy merely because the activity is being carried on across state lines. Perhaps it might well become so, say, if the activity were to frustrate or jeopardize existing Canadian foreign policy. But in the absence of such a conflict, why should it not be allowed to continue?

A viable approach would be for the federal government to look at the *substance* of the proposed provincial activity, without a subsuming preoccupation with *protocol* and *form*. In short, it should inquire how the provincial activity might conflict with or jeopardize Canadian foreign policy, expressed as an *overriding national interest* of the federation. If there is no conflict or jeopardy, it is my view that the provincial activity should be allowed to proceed.

Initially then, the assertion might be made that proposed provincial transnational activity should be measured not by its proposed *form*, but by the proposed *substantive interaction* between a particular province and a foreign state, association, or individual. This measurement might necessarily involve an examination of preliminary events; all significant indices of the parties' expectations of commitment; the actual goods, services and personnel crossing state lines; the regularity and duration of the activity; the existence and effectiveness of machinery to resolve possible disputes; and the subsequent conduct of the parties after the outcome of the activity. It is only through this detailed type of inquiry by the federal government that the true nature of the activities of the provinces in entering the international sphere can be comprehensively assessed. Thus it can be determined whether *what they do* will conflict in each instance with any overriding national interest which is necessarily a part of Canadian foreign policy. And if there is a clear conflict, then it is my view that the federal government should have the executive power to prohibit, nullify, or veto the provincial activity by order-in-council.

A word about provincial "motive" in the field of transnational activity is perhaps appropriate here. Although the approach of this paper tends towards permissiveness for provincial activity, it must not be construed in such a way as to condone provincial actions deliberately calculated to provoke or embarrass the federal government, or to thwart the conduct of Canada's foreign policy. This clearly would be a funda-

mental breach of federal comity, and the provincial activity would fall.²⁹ The provinces must confine their transnational activities to legitimate provincial interests, and conduct them in good faith and with full inter-governmental courtesies and disclosure. Otherwise, the effectiveness of the approach recommended herein could be permanently impaired.

The remaining sections of this part of the paper will suggest some of the transnational activities in which the provinces might wish to participate. In addition, they will set forth the general approach recommended above in the context of each type of activity, and indicate when and how the overriding national interest might be invoked as a form of federal supervision.

Provincial Participation in International Conferences

The traditional method by which the federal government has "allowed" provincial participation in international conferences is to compose Canadian delegations in such a way as to include a number of provincial officials, depending on the particular province(s) and the provincial activity concerned. This has worked out particularly well with respect to the general conferences of the International Labour Organization (ILO). Senior provincial officials are often invited to be members of or advisers to the Canadian delegations; or at the request of a province, provincial officials are allowed by Ottawa to attend conferences as official Canadian observers.

With respect to education, this method has been employed for UNESCO Conferences, Commonwealth Conferences on Education, and the International Conference on Public Education; consultation has taken place between the Council of Ministers of Education and the federal government to select provincial officials for Canadian delegations.

Considering the fast-changing conditions and the ever-increasing role of government (not only in administration but in the acquisition of techniques and personnel) in the field of education, however, it is necessary to question whether the provincial governments can adequately discharge their constitutional responsibilities in the field by confining their independent activities to the province, when a vast reservoir of information and skilled assistance is available beyond Canadian borders. One must feel a certain amount of sympathy for the peculiar position of Quebec in this respect; that province is now economically and socially prepared to take advantage of the heretofore untapped educational resources of other French-speaking nations, to the benefit of a great majority of its inhabitants.

²⁹ See Edward McWhinney, *op. cit.*, p. 157.

Yet it might be argued: Aren't all these advantages and resources, this information and assistance available to the provinces right now through participation of provincial officials as members of Canadian delegations? Herein lies the very nub of the problem. Perhaps the short answer is that in recent years, Canada has come closer to the classical "federal" model of an equitable distribution of actual powers between the provinces and the central government, and that there is now no particular virtue necessarily consistent with Canadian unity in the central government remaining as an international guardian or protector in areas of exclusive provincial jurisdiction. Education is a very diverse field, unlike matters such as local trade and development, and there is a great variation in courses of action open to provincial governments in this area. The very idea of allowing another level of government always to determine the form of provincial initiatives beyond national boundaries, and indeed to deprive a province of its own approaches and distinctive features when it takes these initiatives is, in a word, stifling. It is no great revelation to suggest that each province has its own particular priorities in the field of education, and in many respects the diverse nature of Canadian culture is reflected in these priorities. Governmental initiative can easily be stifled by cumbersome and unnecessary intergovernmental machinery brought about not by a concern that another government's substantive jurisdiction is being invaded, but by a rigid adherence to protocol and form. And, of course, the most serious consequence of the stifling of provincial initiative is local isolationism, which in the field of education might be disastrous for all Canadians in the long run.

One must not take this argument too far by saying, "What's wrong with a province attending an international conference on education? There are no international law consequences affecting the federal government." This approach refuses to acknowledge that in some particular instances, Canada's foreign policy (as part of an overriding national interest) could be seriously jeopardized. To use a hypothetical example, the attendance of the province of Alberta at an education and human rights conference in South Africa to discuss the Hutterite problem and the South African policy of apartheid might run afoul of Ottawa's present policy, as a member of the Commonwealth and the U.N., towards that country. This example, of course, is extreme and somewhat fanciful. But the point is that there must be an opportunity for Ottawa to invoke the overriding national interest by prohibiting a province's attendance; and this opportunity to override can exist only if there is close communication and consultation between the provinces and Ottawa *prior to* the provincial attendance.

In summary, then, there should be room for provincial initiative in independently attending international conferences on education or on other matters of provincial jurisdiction. Although it often might be convenient for the provinces to participate as part of a Canadian delegation, this form of attendance should not be imperative, for in some instances it might be too restrictive. But in every case of provincial initiative concerning international conferences, the federal government should be informed in advance, and the communication should be full and complete. In addition to an assumption of courtesy and good manners, the federal government should have a right to expect forthright answers to legitimate questions concerning the anticipated provincial activity. Finally, the federal government should have the right to invoke the overriding national interest to prohibit by executive act any provincial attendance and participation where it would seriously conflict with Canada's foreign policy, but this power should be used with great caution.

It may happen in the long run that few provinces want to attend international conferences on matters of provincial jurisdiction as independent participants, and that some provinces may find participating as part of a Canadian delegation is far more convenient and productive. This would not be undesirable by any means. But considering the geographic, economic, and cultural diversities among all the provinces, as well as the special interest of some provinces in the development of "la francophonie", the opportunity for independent provincial initiative in these matters should be permitted.

One possibility that might be considered is the voluntary attachment of one or more federal officials to particular provincial delegations attending international conferences as independent participants. This situation might arise in the difficult cases where the federal government is concerned about a potential conflict with its foreign policy, yet finds it inappropriate to invoke the overriding national interest to prohibit provincial participation. The presence of the federal official(s) in this situation would ensure close communication between the province and the federal government throughout the duration of the event, and would provide a ready adviser if the question of Canada's foreign policy and national interest came to be considered. In 1968 the late Premier Johnson of Quebec hinted that his government might favour such a proposal, when he stated: ". . . we could have no objection if we could find a mechanism which would allow Canada to send someone to oversee interests which are not provincial."³⁰ The recent *Working Paper on Foreign Relations* by the Quebec government reiterated this

³⁰ Toronto *Globe and Mail*, May 9, 1968.

suggestion, and went on to propose a method whereby an independent provincial delegation would join forces with other provincial delegations to form a single homogeneous Canadian delegation at conferences concerning provincial matters.

Finally, a caveat must be recorded concerning the participation of Quebec in a continuing educational conference of French-speaking states in Gabon and France in 1968. Notwithstanding all the furor in the press and the strong reaction of the federal government by its publication on May 8, 1968 of the White Paper entitled *Federalism and International Conferences on Education*, these events must not be blown out of proportion. In retrospect, both parties to the dispute would seem to have overreacted: Quebec through its failure to communicate with Ottawa, or to answer official correspondence from Ottawa; and Ottawa by its severing of diplomatic relations with Gabon, and its subsequent publication of the strongly worded White Paper in the heat of a federal election campaign. Quebec's lack of courtesy might well have been in reaction to a reverse situation in 1965 when, after Canada and Tunisia had signed an agreement for technical cooperation, Tunisia sent an official invitation to the Quebec Minister of Education, Paul Gérin-Lajoie, to attend a conference of ministers of education in that country. The invitation was sent through proper diplomatic channels via the Department of External Affairs in Ottawa, but somehow was "lost" until many weeks after the event, when it finally reached Gérin-Lajoie. Another incident in 1968 involved Tunisian President Habib Bourguiba's state visit to Canada and Ottawa's attempt to "freeze out" the Quebec government from any official reception or a degree-granting ceremony at the University of Montreal, despite the facts that Tunisia is largely French-speaking with an interest together with Quebec in "la francophonie", and that the Government of Quebec had expressed an interest in the visit.³¹

In any event, neither Quebec nor Ottawa can be said to have "clean hands" considering the totality of these situations. But surely these are not the most important problems facing Canadian federalism today. Clearly, there are more important things to be done in effecting constitutional adjustment and change than for one level of government to be lecturing the other on questions of intergovernmental courtesies. A presumption of full disclosure and good faith is not too much to expect at this juncture of Canadian development.

That Quebec and Ottawa are capable of reaching a temporary agreement as to a common approach to attendance at international

³¹ *Toronto Daily Star*, May 6, 1968.

conferences was demonstrated in February 1969 in the arrangements worked out for a conference of French-speaking countries in Niamey, which is located in the African republic of Niger. Both Quebec and Ottawa received individual invitations. The arrangements worked out were that Canada's Secretary of State, Gérard Pelletier, would be recognized as the sole leader of the Canadian delegation, with delegates from three provinces also attending. Ontario had one delegate, New Brunswick two, and Quebec three, including Minister without Portfolio, Marcel Masse. There were four federal delegates besides Mr. Pelletier. It was understood that Mr. Pelletier would exercise the single vote of the Canadian delegation, but if there were disagreement among the delegates on matters of provincial jurisdiction, Canada would abstain. The three provincial flags flew along with the Canadian flag at the conference, and the plaque on the conference table in front of the Canadian delegation carried the name of Canada and each of the three provinces. Finally, it was expressly agreed between Quebec and Ottawa that these arrangements would not bind either government in the search for a permanent solution to the problem.

Another arrangement of greater long-run significance was the one worked out during the week of March 16, 1970 at the second conference of French-speaking countries in Niamey. Both federal and Quebec delegates were present, and the total Canadian delegation was again led by Secretary of State Gérard Pelletier. The main item on the conference agenda was a draft constitution for a new international francophone agency to develop educational, cultural, and technical programs on a joint basis. The original draft submitted for the delegates' approval provided that membership in the agency would be restricted to sovereign states. France (with the tacit support of the Quebec delegates) moved an amendment to the effect that membership should be open to any government or institution which might benefit from participation. Mr. Pelletier, on behalf of the Canadian delegation, opposed. After considerable debate in an atmosphere of semi-crisis which saw Mr. Pelletier in constant touch with Ottawa, a compromise solution was reached whereby membership in the agency would be open to non-sovereign governments of institutions — but only so long as they had first obtained agreement from their respective national governments. Thus, the problem was shifted away from the international plane and made a matter of purely internal constitutional resolution. In the future, therefore, it should be possible for Quebec to directly participate in the institutions, activities, and programs of this important new francophone agency, while at the same time preserving Ottawa's over-riding legal jurisdiction.

International Organizations

What if a province wishes to apply for membership in any international organization? Before one may say that this is a right restricted to sovereign states in the international community and that independent provincial participation would lead to incompatibility of policy and lessening of authority of Canada's foreign policy, the following must first be examined: the nature of the organization concerned, the type of provincial membership proposed, the obligations of membership, the subject matter of the organization's activities and the federal government's interest therein, and possible actions of the province for which the federal government might be held responsible.

This type of inquiry, with respect to provincial membership in the United Nations, would reveal a substantive interaction too great and powerful to be consistent and compatible with the present Canadian membership (notwithstanding the unique examples of the independent Ukraine and Byelorussia "membership" allowed by the U.S.S.R.). But when one examines, for example, the membership of the province of Ontario in the "international" organization called NORGLAC (see p. 158), one can readily see that this is a provincial transnational activity in which the federal government would have no apparent conflicting interest. Again, it is what the provinces *do*, not the *form* which is important.

With the specialized agencies of the United Nations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Labour Organization (ILO), and the Food and Agriculture Organization (FAO), the inquiry becomes more difficult. Perhaps, in a few specific circumstances, there is a case for individual provincial participation. Or perhaps close federal consultation with the provinces concerning implementation of conventions, and distribution of documents, with substantial provincial participation in Canadian delegations, will be sufficient to represent provincial interests. But the important factor is that each individual case must be assessed as it arises on its individual merits, without reference to any hard and fast rules based on abstract forms. Perhaps the compromise at Niamey respecting membership in the new international francophone agency might have come sooner and the discussion been less divisive had this approach been followed.

Agents-General: Trade and Immigration Counsellors

The type of transnational activity carried on by various provincial governmental officials abroad can often be very complex. Again, the point is not so much whether this form of activity should be forbidden to

the Canadian provinces, but what they plan to do by adoption of such a form and what detrimental consequences there may be to the paramount national interests of the federal government.

On the one hand, it is clear that the traditional right of a federal state to receive and send diplomatic envoys (*jus legationis*) is in the central government, acting through its Ministers on behalf of the Sovereign. All official communications with foreign governments concerning the whole of Canada will invariably flow through the federal government. On the other hand, the provinces may have an interest in dealing with foreign governments through provincial officials appointed for that purpose, where that interest is in respect of matters of provincial jurisdiction. In some instances communications can be made conveniently through Canadian diplomatic missions; in others, a more permanent and direct channel of communication may be desirable through provincial Agents-General located in some of the major world capitals such as London, Paris, and Washington. *Prima facie*, there is no need to raise a presumption that *all* provincial communications to foreign countries must be directed through Ottawa. It is necessary only if there is a legitimate overriding national interest which requires Ottawa, in its conduct of Canada's foreign policy, to prohibit or limit the establishment of a particular provincial office or mission, as an established channel of communication for certain cases.

Of course, there must be full communication and disclosure by the provinces to the federal government of plans to establish offices or missions in particular areas, and this must be done as far in advance as is politically and administratively possible. Otherwise, it might be too late or embarrassing for the federal government to invoke the overriding national interest, thus jeopardizing Canada's foreign policy.

For example, if it were Newfoundland's intention to establish an office of Agent-General in Rhodesia for the purpose of promoting the sale of Newfoundland seafood products, Ottawa would be entitled, even more than as an act of political courtesy, to be notified of this fact and, if necessary, to prohibit such an establishment. This action would be taken *if* the new office were considered contrary to Canada's foreign policy towards Rhodesia, in view of the U.N. embargo based on Rhodesia's policy of apartheid, and its unilateral declaration of independence which has not been recognized by Britain or Canada. Yet such a prohibition by the federal government would not be practically possible or diplomatically feasible if Ottawa did not hear of the matter until the Agent-General and his staff had arrived in Rhodesia. In short, full communication and good faith between the provinces and the federal government is essential in all matters pertaining to external relations.

Already the provinces have taken steps in this suggested direction. Quebec has a well-established Délégation Générale in Paris with a staff of over fifty persons. The great bulk of its activities are concerned with educational, cultural, trade, and development matters. Paris gives full immunities and privileges to the Quebec mission. Ontario has had Ontario House in London, England for many years now, with a number of other provinces also having similar offices. Their activities, although concerned primarily with immigration, trade, and industrial promotion, have not necessarily been confined to these fields. Britain, however, does not grant full diplomatic immunities and privileges to the provincial officials. Throughout their existence, there has been virtual harmony between Ottawa and the provinces concerning these offices. There is a frequent interchange of information between Canadian embassies and provincial offices abroad, and collaboration on many joint problems. Yet these offices were set up, and indeed remain, as independent channels of communication between the provinces and foreign governments and individuals, with the tacit approval of Ottawa.

Traditionally, Ottawa has assumed that provincial officials in these offices have not performed diplomatic functions as these were exclusively reserved for federal representatives. But there is a substantial grey area between what is "a diplomatic and consular" function and what is not. Without going into an analysis of this aspect of international law and practice, it is sufficient to state here that there is no necessity for a fine delineation of the grey area for purposes of Canadian federalism. The better approach is to assume permissiveness on behalf of provincial activity with an overriding federal interest as a check on activity which directly conflicts with the national interest asserted as Canada's foreign policy.

The experience of the Ontario Department of Trade and Development³² with respect to trade offices and missions is instructive as to the sort of harmonious consultative arrangements that are possible between the provinces and the federal government within the confines of the approach recommended. Ontario has trade offices in London, Dusseldorf, Stockholm, Milan, Jamaica, and in six cities in the United States. Consideration is being given to the establishment of offices in Tokyo and Belgrade. In each case, the Department of External Affairs in Ottawa has been notified in advance of Ontario's intention to establish an office abroad and has been given an opportunity to express an opinion on the matter. With respect to Ontario-sponsored trade missions sent to trade

³² Information from this Department was received from W. A. Fowler, Chairman of the Exhibition Section, K. Crosswell, Chief of Organization and Methods, and Mrs. Jean Woodburn, and is included in the *Ontario Government Departmental Survey, 1968*.

shows and fairs in a number of European countries (including Yugoslavia, Czechoslovakia, and Poland) and in several Far Eastern countries (including India, Singapore, and Hong Kong), the federal Department of Trade and Commerce has been notified in advance in each case. And on one notable occasion, the federal Department refused to allow a mission to attend the annual Leipzig Fair in East Germany because of Canada's policy of non-recognition of East Germany. Ontario was willing to abide by this decision, recognizing the overriding national interest inherent in Canada's foreign policy. Had Ontario insisted on sending the mission to Leipzig, and assuming no compromise arrangement could be worked out through federal and provincial consultation, it would seem appropriate in the context of this paper's recommendations for the federal government to prohibit, nullify, or veto the provincial endeavour by executive action. The number of occasions on which this extreme step would have to be taken, however, would be very few in the overall picture.

The Distinction Between Treaty-making and Treaty-implementation

Ever since the *Labour Conventions* case³³ where the distinction between treaty-making and treaty-implementation became firmly entrenched in our constitutional law, two main views have emerged concerning the resulting constitutional practice whereby the federal government is prohibited from enacting legislation to implement treaties the subject matter of which is provincial jurisdiction. On the one hand, K. C. Wheare³⁴ regards the position as quite satisfactory, since it adequately safeguards regional interests against any consequential power of controlling internal relations by the federal government; at worst, it is one of those inconveniences which are the price of federal government. On the other hand, both the late Mr. Justice Rand (retired from the Supreme Court of Canada) and Lord Wright, who sat on the case as a member of the Judicial Committee of the Privy Council, disagreed that it was possible to eliminate treaty character from legislation accomplishing its terms; they inferred that treaty-making (including implementation) was a single subject under the residual power of the dominion.³⁵

In the contemporary Canadian situation, neither of these views is acceptable as an approach to constitutional practice and international relations. The very nature of external relations and transnational

³³ *Supra*, note 11.

³⁴ See K. C. Wheare, *Federal Government*, Oxford University Press, New York, 1964, pp. 177-178.

³⁵ See Bora Laskin, *supra*, note 19, at 110-111.

activity virtually demands that a participating government be able to perform what it promises, or complete what it undertakes. Hence, the distinction between "making" and "implementation" is not realistic or practical. Yet, as the general approach of this paper has already indicated, the necessity for a unified foreign relations power (in the one sense) is no reason to exclude the provinces from all transnational activity on their own account. The provinces are equally capable of maintaining that unity of "making" and "implementing" functions within their constitutional jurisdiction as the federal government is with respect to matters of federal jurisdiction. Whereas, under the form prescribed in the *Labour Conventions* case, it was implied that the federal government could enter into international agreements on *all subjects*, federal or provincial, with the subsequent requirement of provincial implementing legislation in the case of the latter, this paper proposes that the provinces be allowed to enter into international agreements on provincial subjects, and retain the power to implement same, but always subject to the invocation of the overriding national interest by the federal government (by prohibition, nullification, or veto) in cases of conflict with national foreign policy. A simplified view of this proposal might be as follows:

- 1) The federal government gives up its right to make "provincial treaties" in return for the right to invoke the overriding national interest in the event of a conflict.
- 2) The federal government retains its rights to make and implement "federal treaties".
- 3) In treaties involving joint jurisdiction, both levels must be involved.
- 4) In all cases, there is a resulting merger of treaty-making and treaty-implementation functions, except in the rare cases of a conflict when the overriding national interest is invoked.
- 5) The result is an increased flow of goods, services, personnel, and ideas across national boundaries through this provincial and federal transnational activity and commitment.

Again, however, it must be reiterated that such a proposal is based on the fundamental assumption of complete disclosure of information and intention by both levels of government prior to the event.

Provincial Agreements or Arrangements with Foreign States

In developing the general approach set forth in this section, we might assert the simple proposition here that the Canadian provinces should be able to make agreements with foreign states if 1) the agreements are

not in conflict with the interests of federal government; and 2) the agreements deal with a question of provincial jurisdiction according to the Constitution. But this statement leaves some questions unanswered. Can the provinces conclude formal "treaties" (as opposed to informal arrangements) subject to the two conditions? Who decides whether the two conditions have been met — the federal government, the province, or a court? Suppose a province subsequently is in breach of an international agreement validly concluded as above — who is responsible to the foreign country for that breach? These three questions lead us to the heart of the major problems concerning this type of transnational activity (known as *jus tractatum*).

In the first place, the name of the agreement or arrangement is not important. It has been demonstrated many times that the significance of terminology is minimal, and that terms such as "treaty", "convention", "protocol", "accord", "entente", and "agreement" are of no legal consequence.³⁶ The principal thesis of this recommended approach is worth repeating: it is the substantive interaction between the province and the foreign state which will determine whether the agreement or arrangement is in conflict with any overriding interests of the federal government. In making this determination, a detailed inquiry must be conducted in each instance by both levels of government, and the inquiry must be conducted on the basis of good faith and the full disclosure of information. In addition to a determination of the focal point of the agreement, consideration must be given to surrounding circumstances, the subject matter, regularity and duration, and the nature of dispute-resolving machinery. And finally, in determining whether the agreement conflicts with the overriding national interest which can be invoked by the federal government, close attention must be paid to just what the province will *do* under it: what goods, services, personnel, money, and intelligence will be crossing national boundaries, and to what extent the agreement is based on reciprocity or shared commitment.

As with other types of transnational activity, the federal government has traditionally been reluctant to allow extensive provincial initiative in making agreements. The requirement of Ottawa that most provincial activity of this nature be subsumed under a general "umbrella" agreement between Canada and the foreign government concerned would once more seem to be a rigid adherence to form, with little thought given to the *substance* of what the provinces are anxious to do these fields. The general position taken by the federal government in hurriedly arranging a concurrent exchange of letters with France at the time the Quebec-

³⁶ See, for example, the numerous authorities quoted by Ronald Delisle, *op. cit.*, pp. 117-118.

France cultural entente was signed on May 24, 1965 is indicative of this rigidity. Again, it must be asserted that some provinces might wish to partake of this type of activity only under a federal "umbrella", and this is not an undesirable thing. But each province must be free to take its own initiatives in this type of activity, subject only to the invocation of the overriding national interest by the federal government in the case of a clear conflict.

The next question is, who decides whether there is a conflict or not, and whether the overriding national interest should be invoked? At first blush, one might think that this was the classic type of decision to be made by a constitutional court in a federal state or, taking today's Constitution, by the Supreme Court of Canada. Whether the present judiciary (or indeed a "reformed" judiciary) is equipped to make a momentous public law and policy decision of this type is a question which has been well discussed elsewhere,³⁷ but which is beyond the scope of this paper. Suffice it to say that such a proposal would run counter to the doctrine of parliamentary and legislative supremacy which is still one of the cornerstones of our constitutional system. In any event, it is my view that the very nature of international relations and national foreign policy demands that it be determined by the federal executive, acting preferably through the Secretary of State for External Affairs or the Prime Minister. The courts can still determine whether the province is within its legislative jurisdiction in the implementing function, but the more important question of conflict with national foreign policy in the initiating stage must lie with the executive head of state responsible for Canada's foreign policy. And the most convenient form for the exercise of this executive power would be through order-in-council.

International Responsibility

As pointed out in the previous section, it is a widely accepted rule of international law that it is the federal government which is responsible for a province's breach of an international agreement. This, of course, is the primary reason for vesting the decision as to whether a provincial international agreement conflicts with the overriding national interest (i.e., Canada's foreign policy) in the federal government and not in an independent judicial body. Thus, when the federal government, having received notice of an impending provincial international agreement, does not prohibit it, it may be assumed that it tacitly approves of it and will

³⁷ See Peter Russell, *supra*, note 1; also Edward McWhinney, "A Supreme Court in a Bicultural Society: The Future Role of the Canadian Supreme Court" in Ontario Advisory Committee on Confederation, *op. cit.*, p. 89.

be responsible for any consequences of provincial breach or failure to perform. Of course, federal responsibility is not confined to breaches of provincial agreements in the international sphere; it also exists with respect to provincial torts, injuries to aliens and provocation of hostilities. But the point is that it is a national government's *responsibility* in international law which will not permit the provinces of a federation *complete* international sovereignty in their fields of exclusive constitutional jurisdiction.

The importance of this rule of state responsibility in the context of the present discussion can be overestimated, however. In the first place, under the approach recommended, the federal government will be notified of the proposed provincial activity sufficiently early. There should be adequate time for a full consideration of the proposal to identify potential areas of provincial default. Then, if a province has had a past history of defaulting on a particular type of transaction, the federal government might take the extreme precaution of requiring the province to provide an indemnity bond ensuring full performance of its obligations under the agreement. The pressures of restraint against the province refusing the bond, or against the federal government invoking the overriding national interest for failure to do so, would be sufficiently great to make either event highly unlikely.

If there are difficulties anticipated respecting adjudication of disputes under an international agreement made by a province, the federal government, on the ground of its "state responsibility", might insist on certain modifications to the proposed agreement. For example, there might be a clause to stipulate that all disputes between the parties are to be settled exclusively by reference to internal Canadian law (such as the law of the contracting province), and that the contracting foreign government by its agent consents to be treated as a Canadian national for purposes of resolving the dispute. This is known in international law as a "Calvo clause". Ingenious variations of these clauses might be incorporated in provincial international contracts, and the federal government would be able to insist on their adoption through its "overriding national interest" sanction.

But in any event, few of the transnational activities contemplated by the provinces at this juncture would be likely to result in a provincial contractual default of failure to perform, for their subject matter seldom involves the extensive exchange of money, goods, or services across state lines.

If the provinces do make attempts to broaden the scope of the international agreements to which they are party, the federal government can always protect itself against possible provincial defaults by methods such

as those suggested above. In this fashion, the provinces can be made to assume, at least indirectly, part of the "state responsibility" for such transnational activity.

External Aid

Of all the forms of transnational activity in which the provinces might participate on their own initiative, this has the greatest scope. The corollary of this is that of all the forms of activity heretofore discussed, Ottawa should be least concerned about having exclusive control over external aid. A Canadian external aid program without substantial participation of the provinces would be unacceptable, if not impossible, in view of the fact that a great many of the matters comprising external aid projects are subjects of provincial jurisdiction (hydro-electric power, teacher exchanges, technology, and so on). The difficulty is to prescribe the nature of that participation.

No one would deny the necessity for the coordinating role of the Canadian International Development Agency in Ottawa. Many departments of the Ontario government either have availed themselves of the opportunities which have initially come from Ottawa, or have responded to a direct request to participate by providing teaching and advisory personnel and domestic training facilities. In virtually every case, the cost of such provincial participation has been borne by Ottawa. In addition to the general advantages to be gained in alleviating some of the problems of the world's poorer countries, provincial participation has had some direct benefits at home in terms of the enlightenment of participating government officials, who on their return have passed on their experience and insights to many other persons within the province.

But is it essential that Ottawa always maintain a supervisory and paternalistic role in respect of provincial external aid initiatives, a role which is much more than that of a coordinator? Particularly with respect to the development of "la francophonie", there are some provinces, notably Quebec, which might desire a more direct approach in making initial contacts with possible recipient states or with other donor states on a joint program. As long as there is full federal-provincial consultation to avoid coordination problems, and as long as a province is willing to finance these ventures itself, there can be no valid objection to the province acting independently, in the absence of a direct conflict with Canada's foreign policy (such as a "provincial arms to Cuba" situation). Therefore, direct provincial liaison with recipient states in provincially sponsored projects should be permissible where it is desired, as long as there is full disclosure sufficiently in advance to the federal authorities.

And of course, the reverse holds true for federal external aid programs involving provincial personnel or facilities. It should be expected that the federal government would consult with provincial authorities before formulating programs in provincial fields.

The difficulties concerning the rule of federal government responsibility in international law discussed previously are at a minimum in the field of external aid, largely because the provincial "international act" is primarily unilateral or one-way, giving rise to very few occasions in which the federal responsibility for a provincial default would come into play. The shared commitment of the donor and recipient, although often great, is virtually in the control of the donor, so that one can foresee few circumstances in which Ottawa could be called to account by the international community for an external aid default of one of the provinces. Ottawa's main concern with provincial initiatives in this field should be one of coordination.

As with some of the other areas of provincial transnational activity, it may be found that all or some of the provinces in any event wish to channel all their external aid initiatives through Ottawa. This is not an undesirable situation by any means. But the opportunity for independent provincial initiative should exist.

Constitutional Distribution of Powers

There remains for discussion the all-important question of the constitutional distribution of powers and its relationship to the conduct of international affairs by the federal government and the provinces. Today, given the existing distribution in sections 91-95 of the British North America Act, "international affairs" is not itself a specific head of power. Implementation of treaties depends on the subject matter of the treaties, and finds its legislative receptacle according to sections 91-95; but the making of treaties is generally considered to be an executive act.

Assuming that some clarification is required of the present constitutional division of authority over international relations between the federal government and the provinces, it is my view that the existing distribution found in sections 91-95 and established through judicial precedent and constitutional practice should be the general demarcation line between federal and provincial activities in the field — subject, of course, to the proposed federal power of prohibition, nullification, or veto in situations where it is necessary to protect Canada's overriding national interest. And if, in the course of constitutional adjustment and change during the next few years, a new distribution of powers is agreed upon, that new distribution should then govern the subjects of the

international relations of the federal government and the provinces. In other words, it is the substance of the international activity which determines its distributive receptacle. If it were otherwise, international relations would have to be considered as activity separate and distinct from the domestic activity of each level of government, a position which today is incompatible with the practical and integrated workings of all governments, federal and provincial, in Canada.

Therefore, if the approach recommended in this paper were adopted, an extreme shifting of jurisdictional powers to one level of government or another as part of the process of constitutional change would result in a corresponding extreme shift of power concerning international relations. The prior recognition of this fact by those engaged in bringing about such change would tend to have a salutary and restraining effect on the general process of redistribution of powers. For example, if the provinces were to assume responsibility internationally, as well as internally, for all matters coming within their legislative jurisdiction, the federal government would have to consider the broader ramifications of a wholesale or partial transfer to the provinces of such powers as broadcasting or social security. Similarly, assuming that the redistribution of powers between the federal government and the provinces is a "two-way street", the provinces would have to consider in the same manner the transfer to the federal government of such powers as pollution or housing. This effect on the redistribution process would not be undesirable, however. It might more clearly bring into focus the long-run consequences of any particular redistribution. For these reasons, it is recommended that the constitutional amendment and clarification of the subject of international relations should be carried out by the provinces and the federal government prior to any wholesale redistribution. Otherwise, neither level of government in the present process of constitutional reform will be able to determine the true scope and extent of any power which is being considered for transfer.

Finally, it is recommended that after sufficient discussion and experience with these matters make it feasible, the general principles and approach put forward in this paper be specifically embodied in a new international relations provision in the British North America Act or as part of a new Canadian Constitution.

Conclusion

The main thrust of this paper's recommendations is that a united Canada might well benefit from a presumption of validity of provincial transnational activity in legitimate provincial spheres, as long as there is

appropriate federal supervision in the event of conflicts with national foreign policy. And in determining whether there are conflicts, this paper has suggested that more attention be paid to the substance of what the provinces are proposing to do externally, rather than the form.

The recommendations made herein might not be significantly different in practice from those made by the federal government in its two White Papers in 1968, except as to the presumption and degree of permissiveness that it is proposed be allowed provincial activity. In this paper it is recommended that the external projection of legitimate provincial activities be presumed valid; and it casts the onus of disproving the presumption before the public on the federal government, which would be equipped, however, with the very powerful supervisory sanction of an executive prohibition, nullification, or veto where needed. The federal government's proposals admit of no such presumption of validity but generally contemplate most provincial transnational activity as invalid unless it falls under a federal umbrella or authorization of some sort; thus the federal supervision is obtained by requiring provincial transnational activities to adhere to a certain predetermined form, rather than by more direct executive action in the event of conflicts with national foreign policy. The real difference, then, is that under this paper's proposals the federal government has a greater onus, in curtailing provincial transnational activities, to prove to the public and the province concerned that there is a conflict with national foreign policy; but that once having decided to curtail (and to run all the political risks involved), it can move much more quickly and effectively.

As for the Government of Quebec's proposals in its recent *Working Paper on Foreign Relations*, it also has proceeded from a general presumption of validity of provincial transnational activity, but it has failed in my view to adequately spell out the nature of federal supervision in the event of conflicts with national foreign policy.

It should be pointed out that the type of provincial international activity with which this paper has been primarily concerned has been, and will continue to be, only a small portion of the total international activity generated in Canada. The federal government will always be responsible for the lion's share of international relations in such vital areas as national defence, diplomacy, international banking and finance, international trade, and international transportation and communication. And even in such important and fast-developing areas of governmental activity as pollution, urban renewal, and immigration, the jurisdiction tends to be concurrent in both the federal and provincial governments so as to require both direct federal and provincial participation in any international arrangements made, thus precluding any presumption of

validity for the international arrangements of any province that decided to go it alone in these fields.

In short, there is a danger in blowing the importance of independent provincial transnational activities out of all proportion in comparison to the vast range of international activities to be carried on by the federal government in cooperation with the provincial governments. For the most part, Canada will continue to speak with one voice in the international community as she struggles to preserve the internal integrity of the federation in the light of modern responsibilities of both levels of government.

Yet some means must be found for accommodating the desire of some provinces to externally project their legitimate domestic activities into the international community in a manner that does not damage the national interest, yet allows provincial governments to partake of the advantages of our increasingly interdependent world. Particularly with respect to the export of natural resources, the demands on a number of provinces to enter into international arrangements will be very great in the next few years. Water resources and hydro-electric power are the most notable examples. Therefore it is necessary that some suitable constitutional mechanism be devised to accommodate both provincial and federal interests before these demands become too intense.

In some respects, the approach recommended in this paper defies formal articulation in a constitutional clause or provision, in view of the number of intangible requirements of such matters as intergovernmental disclosure, communication, courtesy, and good faith. Yet intergovernmental relations in any federal state are necessarily subject to the same requirements in varying degrees. Otherwise, federalism as a form of government would have succumbed years ago.

The Provincial Interest in Broadcasting under the Canadian Constitution

Ronald G. Atkey

Introduction

The matter of broadcasting has aroused the interest of provincial governments in Canada only since World War II. Onerous responsibilities in the field of education have resulted in deliberate provincial initiatives in constitutional fields heretofore regarded as the primary preserve of the federal government.

What is the nature of these onerous provincial responsibilities in education? It is not only a question of servicing increased numbers. The public demand has been for *better* education: broader in scope, more dynamic in impact, and more specialized in approach. In our rapidly changing age of urbanism, affluence, enlightenment, and technological development, new techniques of instruction in the educational process have had to be devised and utilized by government to keep pace with this demand. In addition, a country as diverse as Canada in matters of geography, language, and culture has presented government with unique problems in the field of education. Broadcasting, both as an educational technique or medium, and as a means of overcoming political, social, and economic difficulties peculiar to Canada, has offered a vehicle for beneficial change perhaps unparalleled in our history.

Virtually every provincial department of education in Canada has made some effort towards the adoption of television and radio as a medium for the dissemination of educational and cultural materials within the province. But arrangements to date have been made largely on an ad hoc basis: provincial or local cooperation and agreement with the CBC or CTV networks or federally licensed private broadcasters; provincial or local production or sponsorship of videotapes for use on

closed-circuit systems in some schools and universities; local production for community cable systems; or government or private production of conventional films and sound tapes. But as provincial activities in the field of education expand at a rapid rate, so does the correlative provincial interest in the field of broadcasting. Already the Province of Quebec has asserted a vital constitutional interest in the field which embraces new structures and proposals going considerably further than the mere ad hoc arrangements above. Other provinces, in varying degrees, have expressed a desire to clarify and/or establish a provincial constitutional interest.

It is therefore appropriate that the Government of Ontario assess its position in this field at the present time, with a view towards clarification of its long-term policy and the possible reconciliation of objectives in fields of education and culture with its approach on general matters of constitutional reform. This paper is intended as a background document relevant to this task.

At the outset, it should be stated that the primary interest of the province in the subject of broadcasting is in "educational broadcasting", and therefore, the bulk of this paper deals with that subject. A secondary interest of the province is in matters of "culture", and this will be dealt with to a considerably lesser extent.

The Interrelationship of Federal and Provincial Powers

The Field of Broadcasting

Broadcasting, as a subject of legislative jurisdiction, is not mentioned in the British North America Act. It is unlikely that in 1867 the framers of Canada's written constitution would have even contemplated the existence of such a subject. Only the exceptions in section 92(10) (a) provide positive textual language which might embrace federal jurisdiction over certain forms of broadcasting:

Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
(Emphasis added.)

Whether the words "telegraphs and other works and undertakings . . ." embrace merely the technical aspects of broadcasting (radiocommunication, control of the Hertzian waves) or broadcasting in a broader sense (use of technical media to inform, educate, entertain, and influence) is a question which has never been judicially determined. Only with respect to the former was it judicially suggested in 1932, in the *Radio*

case,¹ that the federal government has exclusive jurisdiction under section 92(10) (a).

The other provisions of the British North America Act which are relevant in determining which level of government has jurisdiction over broadcasting are as follows:

Section 91 (general clause): It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; . . .

Section 92(13): In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, —

13. Property and Civil Rights in the Province.

16. Generally all Matters of a merely local or private Nature in the Province.

Section 93: In and for each Province the Legislature may exclusively make Laws in relation to Education . . .

It has not been judicially determined whether broadcasting, in its wider sense (as comprising media to inform, educate, entertain, and influence), would be embraced in the general clause of section 91 or in 92(13) (16). Neither has school broadcasting been judicially assigned to either federal jurisdiction under section 91 or provincial jurisdiction under section 93.

The first legislative effort in the field of broadcasting was in 1905 when the federal government enacted the Wireless Telegraphy Act.² This legislation, passed when broadcasting was still very much in its infancy, provided that:

3(1). No person shall establish any wireless telegraph station or install or work any apparatus for wireless telegraphy, in any place or on board any ship registered in Canada except under and in accordance with a license granted in that behalf by the Minister [of Marine and Fisheries] with the consent of the Governor in Council.

(2). Every such license shall be in such form and for such period as the Minister determines, and shall contain the terms, conditions and restrictions on and subject to which the license is granted; and any such license may include two or more stations, places or ships.

¹ *In Re Regulation and Control of Radio Communication*, [1932] A.C. 304; [1932] 2 D.L.R. 81; [1932] 1 W.W.R. 563.

² (1905) 4-5 Edw. VII, c. 49.

Then, in 1913, the federal government enacted the Radiotelegraph Act³ which defined "radiotelegraph" as including:

2(b). . . any wireless system for conveying electric signals or messages including radio-telephones.

Although this Act was concerned primarily with ship radios and stations, it did attempt to assert a controlling interest over all types of broadcasting through the following sections.

3. No person shall establish any radiotelegraph station or install or work any radiotelegraph apparatus in any place in Canada or on board any ship registered in Canada except under and in accordance with a license granted in that behalf by the Minister [of Naval Service].

10. The Governor in Council may —

(b) accede to any international convention in connection with radiotelegraphy, and make such regulations as may be necessary to carry out and make effective the terms of such conventions . . .

(c) make regulations for the censorship and controlling of radiotelegraph signals and messages in case of actual or apprehended war, rebellion, riot or other emergency.

11. The Minister may make regulations —

(c) defining the different kinds of licenses that may be issued, their respective forms and the several periods for which they shall continue in force;

(d) prescribing the conditions and restrictions to which the several licenses shall respectively be subject. . .

The first private broadcasting license under the authority of the above legislation was issued in 1919 to the Canadian Marconi Company of Montreal. By 1926 broadcasting was definitely established throughout the country, with ninety-one federal licences issued and forty stations in actual operation.⁴

Then in 1928 the federal government appointed a Royal Commission on Radio Broadcasting, chaired by Sir John Aird. In 1929 the Commission made the following recommendations:

(a) that broadcasting should be placed on a basis of public service and that the stations providing a service of this kind should be owned and operated by one national company; that provincial authorities should have full control over the programs of the station or stations in their respective areas;

³ (1913) 3-4 Geo. V, c. 43.

⁴ See E. Austin Weir, *The Struggle for National Broadcasting in Canada*, McClelland and Stewart, Toronto and Montreal, 1965, pp. 1-3.

- (b) that the company should be known as the Canadian Radio Broadcasting Company; that it should be vested with all the powers of private enterprise and that its status and duties should correspond to those of a public utility;
- (c) that a Provincial Radio Broadcasting Director should be appointed for each province to have full control of the programs broadcast by the station or stations located within the boundaries of the province for which he is responsible;
- (d) that a Provincial Advisory Council on radio broadcasting should be appointed for each province, to act in an advisory capacity through the provincial authority;
- (e) that the Board of the company should be composed of twelve members, three more particularly representing the Dominion and one representing each of the provinces;

The significance of this Report was that, for the first time, there was some official recognition of a provincial interest in the field of radio broadcasting. In addition, the Report implicitly recognized the distinction between technical aspects of radio broadcasting (to remain under federal control), and matters of programming (to be under provincial control).

In 1931 the Province of Quebec, supported by Ontario, New Brunswick, and Manitoba, precipitated the Reference⁵ in the Supreme Court of Canada on the federal provincial issue of control over radio. The Court held, by a three to two decision, that Parliament had exclusive jurisdiction to regulate and control radio communication. On an appeal to the Judicial Committee of the Privy Council in 1932, the Supreme Court opinion was upheld. Viscount Dunedin delivered the opinion of the Court:

Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91. . . . Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (a) within both the word "Telegraphs" and the general words "undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its

⁵ [1931] S.C.R. 541.

fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a non-entity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.⁶

The Court did not really address itself to the status of a broadcasting system which operated exclusively within a province and thus could not be considered "Works and Undertakings connecting the Province with any Other or Others of the Provinces". However, Viscount Dunedin did express a reluctance, based on practicality, to endorse any bifurcation of jurisdiction in the general field of broadcasting:

Although the question had obviously to be decided on the terms of the statute [the Radiotelegraph Act], it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency.⁷

In the argument of the Radio Reference before the Judicial Committee of the Privy Council, counsel for the Attorney General for Quebec had argued that parts of the subject of broadcasting were within provincial jurisdiction under section 92(13) of the British North America Act. He cited, as an example, the control of broadcasting for educational purposes, especially as to the language used. Some three years earlier, Premier Taschereau of Quebec had publicly emphasized provincial program control and its relation to education, obviously for the benefit of the Aird Commission which was conducting hearings at the time.⁸ The Judicial Committee did not deal directly with this argument, however, but preferred to confine its judgement to the constitutional validity of the federal Radiotelegraph Act and the technical aspects of broadcasting relating to transmitting and receiving equipment.

Following the report of the Aird Commission in 1929, the decision of the Judicial Committee of the Privy Council in the *Radio Reference*, and the report of a Parliamentary Committee on Broadcasting, the federal government passed The Radio Broadcasting Act in 1932.⁹ This Act created the Canadian Radio Broadcasting Commission (combined predecessor of the BBG and CBC) and gave it power, *inter alia*, "to regulate and control broadcasting in Canada carried on by any person whatever",¹⁰ including the determination of the number, location and

⁶ *Supra*, note 1, at 314-315.

⁷ *Id.*, at 317.

⁸ *Op. cit. supra*, note 4, at 10.

⁹ (1932) 22-23 Geo. V, c. 51.

¹⁰ *Id.*, s. 8.

power of stations; the proportion of time that was to be devoted by any station to national and local programs, and the proportion of advertising; the making of recommendations to the Minister with regard to the issue, suspension, or cancellation of private broadcasting licences (the licensing authority rested in the Minister); and the allotment of channels to be used by stations in Canada.

The only provision in the Act involving the provinces was the provision in section 6 for the appointment of not more than nine assistant commissioners, not more than one from each province, the appointment to be made after consultation with the government of the province in which the assistant commissioner resided. In actual fact, only three commissioners were appointed, and it never became necessary to consult the provincial governments. Apart from this provision, the federal government virtually ignored the recommendations of the Aird Commission relating to provincial involvement in the field of broadcasting.

Four years later, in 1936, the federal government remodelled its broadcasting legislation by abolishing the Canadian Radio Broadcasting Commission and substituting the Canadian Broadcasting Corporation, under the new Canadian Broadcasting Act.¹¹ The new Corporation was to be composed of "a board of nine governors appointed by the Governor in Council and chosen to give representation to the principal geographical divisions of Canada".¹² There was no reference to the involvement of the provinces at all. The new Corporation was empowered through regulations to:

- 22.1. (a) control the establishment and operation of chains or networks of stations in Canada;
- (b) prescribe the periods to be reserved periodically by any private station for the broadcasting of programs of the Corporation;
- (c) control the character of any and all programs broadcast by Corporation or private stations;
- (d) determine the proportion of time which may be devoted to advertising in any programmes broadcast by the stations of the Corporation or by private stations, and to control the character of such advertising;
- (e) prescribe the proportion of time which may be devoted to political broadcasts by the stations of the Corporation and by private stations, and to assign such time on an equitable basis to all parties and rival candidates.

This Act was to virtually govern national broadcasting in Canada until 1958.

¹¹ (1936) 1 Edw. VIII, c. 24.

¹² *Id.*, s. 3(1).

In 1938 the federal government enacted a new Radio Act¹³ which replaced the earlier Radiotelegraph Act of 1913.¹⁴ The new Act defined "broadcasting" in the technical sense:

2(1) (a) "broadcasting" means the dissemination of any form of radioelectric communication, including radiotelegraph, radiotelephone and the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves, intended to be received by the public either directly or through the medium of relay stations;

The Radio Act also contained a provision dealing with any radio stations owned or operated by any province and stating explicitly that the provisions of the federal Act were to apply and have full force and effect.¹⁵ This was an unequivocal assertion of federal jurisdiction in all technical aspects of broadcasting, including technical licensing of stations and equipment. The Act, with several minor amendments, has continued in force until the present time, with the technical licensing of broadcasting stations and equipment being carried out by the federal Department of Transport (DOT).

It should be noted that by 1928, prior to the Aird Commission and the federal Broadcasting Acts of 1932 and 1936, the federal licensing authority under the Radiotelegraph Act (then, the Minister of Marine) had issued broadcasting licences to agencies of at least two provincial governments: Manitoba Government Telephones (station CKY); and the University of Alberta (station CKUA).¹⁶

In 1945 the province of Quebec passed its own Broadcasting Act,¹⁷ which authorized the creation of a provincial broadcasting service called the Quebec Radio Bureau. The Act was largely a product of Quebec nationalism of the type fostered by Premier Maurice Duplessis at that time. By the Act, the Bureau was given power to establish a broadcasting system to be called "Radio-Quebec" and "in accordance with the constitutional rights of the Province and of the country" to establish broadcasting stations and facilities, to acquire private broadcasting stations, and to maintain and operate such stations.¹⁸ The Department of Education was to have the responsibility for the preparation of educational programs. No mention was made of licensing in the Act, although it may be inferred that the above preambular reference to the "constitutional

¹³ (1938) 2 Geo. VI, c. 50.

¹⁴ *Supra*, note 3.

¹⁵ *Supra*, note 13, s. 2(2).

¹⁶ *Op. cit. supra*, note 4, at 2.

¹⁷ An Act to authorize the creation of a provincial broadcasting service. (1945) 9 Geo. VI, c. 56.

¹⁸ *Id.*, ss. 5, 22.

rights of the Province and of the country" was a recognition of the authority of the Department of Transport in this field.

In 1946, largely as a result of these aspirations of Quebec in the field of broadcasting (Saskatchewan also is reported to have had aspirations),¹⁹ the then Minister of Reconstruction, the Honourable C. D. Howe, announced in the House of Commons a firm policy of the federal government:

I can say the Government has decided that since broadcasting is the sole responsibility of the Dominion Government, broadcasting licenses shall not be issued to other governments or corporations owned by other governments.²⁰

In the light of this federal policy declaration, Premier Duplessis of Quebec apparently decided not to proceed any further with the establishment of the provincial broadcasting system. Although the Quebec legislation was not repealed nor considered by a Court, no further actions were taken under it at that time. In Manitoba, as a result of the policy declaration, CKY Winnipeg was transferred to the Canadian Broadcasting Corporation in 1947. CKX Brandon (another provincially owned station in Manitoba) was sold to a private broadcaster in 1948. With respect to the University of Alberta CKUA licence, following discussions with the federal Department of Transport the Alberta government arranged the transfer of the broadcasting assets of the University to Alberta Government Telephones; but the university authorities still retained the licence, and in fact have done so until the present time. Today, a very minimal amount of programming is provided by the University, the bulk of it being done by the Alberta Telephone System (also an agency of the provincial government).²¹

In 1955 another Royal Commission on broadcasting was appointed, chaired by Robert M. Fowler, and it reported in 1957. After reviewing the existing method of licensing in broadcasting stations under the Canadian Broadcasting Act 1936 (relating to general control of media content) and the Radio Act 1938 (relating to the technical control, licensing, maintenance of standards, and inspections of wireless communication), the Commission went on to affirm:

... [T]hat a licensing system by the state is a necessary and proper part of the regulation of Canadian broadcasting. Under our constitution that function clearly falls within the jurisdiction of the Federal Parliament.²²

¹⁹ Memorandum dated February 3, 1968 prepared by W. C. Pearson of Brandon, Man.

²⁰ Hansard, May 3, 1946, p. 1167.

²¹ *Supra*, note 19.

²² Canada, *Report of the Royal Commission on Broadcasting* (Robert M. Fowler, Chairman), Queen's Printer, Ottawa, 1957, p. 100.

The Commission recommended that technical licensing be continued by the Department of Transport, acting on the advice of a newly constituted body called the Board of Broadcast Governors as to the effect of a potential licence on the existing broadcasting system. This recommendation was adopted by Parliament in its new Broadcasting Act of 1958,²³ although a central recommendation of the Commission concerning the continuation of a single administrative authority over broadcasting was rejected in favour of the creation of a separate body, the BBG, to supervise both the CBC and the private broadcasters. Specifically, the BBG was given the power to regulate the establishment and operation of networks, the activities of public and private stations, minimum time allotments for network programs, program standards, the character and amount of advertising, Canadian talent, terms and conditions for the broadcasting of national programs, and the provision of programs and information on a periodic basis.

In 1965 a case of a provincial attempt to regulate a community antenna television station arose in the British Columbia courts in *Re Public Utilities Commission and Victoria Cablevision Ltd.*²⁴ The Public Utilities Commission wanted to regulate that portion of the Victoria Cablevision Ltd. community antenna television business which consisted of the cable leading from the antenna to the receiving sets in the customer's home. It was admitted that the federal government, under the authority of the *Radio* case, had jurisdiction over that portion of the business ending with the reception of the TV signal at the community antenna. The community antenna television stations in question were already licensed as "land stations" under the federal Radio Act. The British Columbia Court of Appeal unanimously held that the stations constituted a single integrated undertaking falling within exclusive federal jurisdiction, and that the P.U.C. had no power of regulation over them. Thus, the federal power of regulation over this aspect of broadcasting was judicially reaffirmed. This case was followed recently in *Re Oshawa Cable TV Ltd. and Town of Whitby*²⁵ heard in the Supreme Court of Ontario, in which Stark, J. held, *inter alia*, that legislative authority over community antenna television and broadcast distribution services is within federal jurisdiction although this would not preclude the provinces from enacting legislation to regulate traffic and the placing of equipment on highways.

²³ *The Broadcasting Act*, Stats. Can. 1958, c. 22.

²⁴ (1965), 51 D.L.R. (2d) 716.

²⁵ (1969), 4 D.L.R. (3d) 224 (Ont. H.C.); see also Colin McNairn, *Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction*, 47 Can. B. Rev. 355 (1969).

In 1964 the Secretary of State the Honourable Maurice Lamontagne had appointed an Advisory Committee to study the field of broadcasting once more. The three-man Advisory Committee was chaired by Robert M. Fowler, the Chairman of the 1957 Royal Commission. The Advisory Committee recommended in its report made in 1965 that the jurisdiction on broadcast licences should continue to be divided between the Department of Transport and the Broadcasting Authority (proposed successor to the BBG). The former should be responsible for all technical and engineering aspects of the licence, and the latter for all broadcasting aspects. But a number of sophisticated changes were recommended in the procedures to be followed in granting licences, particularly that which allowed the Broadcasting Authority, and not the Cabinet, to assume the final authority for granting a broadcasting licence.²⁶ These recommendations were implemented, for the most part, in the new Broadcasting Act²⁷ passed by the House of Commons on February 7, 1968, and coming into force on April 1, 1968, in which the Canadian Radio-Television Commission was constituted as the "Broadcasting Authority".

In the Advisory Committee's report, there was reference to the interest of certain provincial governments in obtaining licences to operate educational broadcasting stations or networks (although no formal requests had been made to the Board of Broadcast Governors up to that time). The Committee noted the federal policy statement of 1946 by the Honourable C. D. Howe, Minister of Reconstruction,²⁸ and a similar statement by the Chairman of the BBG in 1962, to the effect that broadcasting licences would not be issued to provincial governments, their departments, or agents. The Advisory Committee went on to recommend a new policy:

We are of the opinion that the policy of not granting broadcasting licenses to provincial governments is sound, and is consistent with the position of the federal Government in not holding such licenses itself, but rather granting them to a Crown corporation that is not subject in any way to ministerial control or used for partisan political purposes. Nonetheless, the exigencies of the situation with regard to education in Canada now make it desirable in our opinion, that the federal Government should open up the National Broadcasting System for this purpose. We think, therefore, that licenses should in future be granted to educational institutions or corporations, even if they

²⁶ Canada, *Report of the Committee on Broadcasting* (Robert M. Fowler, Chairman), Queen's Printer, Ottawa, 1965, pp. 101-110.

²⁷ Broadcasting Act (Bill C-163), Stats. Can. 1967-1968, c. 25.

²⁸ *Supra*, note 20.

are wholly or partly owned by the provincial Governments, provided that the Broadcasting Authority is satisfied that the applicant is effectively independent of a direct ministerial control.²⁹

In 1966, the Honourable Judy LaMarsh, then Secretary of State, issued a White Paper on Broadcasting. In addition to setting forth the broad outline of the new legislation to be contained in the new Broadcasting Act, she stated that the federal government was prepared to give immediate consideration to the creation of a new federal organization which would be empowered to enter into an agreement with any province to make public service broadcasting facilities available within that province.

Further details with respect to sections of the White Paper dealing with educational broadcasting will be set forth on page 203ff.

The Field of Education

Section 93 of the British North America Act, giving the provinces exclusive jurisdiction in the field of education, has received little interpretation by the courts in Canada, outside of the question of denominational schools. The most significant case was a Reference in the Supreme Court of Canada in 1938 concerning the authority of certain officials to perform functions vested by four Ontario statutes: the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents' Act and the Deserted Wives' and Children's Maintenance Act. This case has come to be known as the Adoption Act Reference. Sir Lyman Duff, Chief Justice of the Supreme Court, issued in this opinion a strong caveat concerning the nature of section 93:

It is well not to forget, in examining the constitutionality of enactments of the character of those before us, that by section 93 (subject to provisions having for their purpose the protection of religious minorities) education is committed exclusively to the responsibility of the legislatures; and that, as regards that subject, the powers of the legislatures are not affected by the clause at the end of section 91. We should perhaps also recall that section 93 (as is well known) embodies one of the cardinal terms of the Confederation arrangement. Education, I may add, is, as I conceive it, employed in this section in its most comprehensive sense. . . .

The responsibility of the state . . . for the proper education and training of youth rests on the Province;³⁰

²⁹ *Supra*, note 26, at 278.

³⁰ [1938] S.C.R. 398, 402.

In 1949 a Royal Commission on National Development in the Arts, Letters, and Sciences was appointed to study, *inter alia*, the fields of radio and television broadcasting. The Commission was chaired by the Right Honourable Vincent Massey, and was known as the Massey Commission. In an initial section on the question of education, the Commission saw a strong role for the federal government in the provision of financial aid to universities and in cultural fields, the provincial jurisdiction envisaged by section 93 being restricted to *formal* education:

. . . [T]he activities of the Federal Government and of other bodies in broadcasting, films, museums, research institutions and similar fields, are not in conflict with any existing law. All civilized societies strive for a common good, including not only material but intellectual and moral elements. If the Federal Government is to renounce its right to associate itself with other social groups, public and private, in the general education of Canadian citizens, it denies its intellectual and moral purpose, the complete conception of the common good is lost, and Canada, as such, becomes a materialistic society.

In accordance with the principles just explained, we are convinced that our activities have in no way invaded the rights of the provinces but may rather have been helpful in suggesting means of co-operation. We are happy to have been confirmed in this belief by several provincial departments of education which . . . have given us most valuable help and encouragement in our work.³¹

The Tremblay Royal Commission of Inquiry on Constitutional Problems, appointed by the Government of Quebec, noted in 1956 that the Massey Commission's view of education had no foundation in the British North America Act and ignored the view of Chief Justice Duff quoted above. The Report concluded that:

The duty of the Federal Government [in the field of education and culture] . . . is not to intervene directly but to ensure, through its general and fiscal policy, that the provinces be able to discharge their functions fully by themselves.³²

A more recent judicial opinion as to the meaning of section 93 was expressed in 1957 by Mr. Justice Dumoulin in the Exchequer Court of Canada in the case of *Angers v. M.N.R.*³³ The constitutional issue before the Court was whether the federal Family Allowances Act invaded the

³¹ Canada, *Report of the Royal Commission on Arts, Letters and Sciences* (Rt. Hon. Vincent Massey, Chairman), King's Printer, Ottawa, 1951, p. 8.

³² Quebec, *Report of the Quebec Royal Commission of Inquiry on Constitutional Problems*, Vol. II (Judge Thomas Tremblay, Chairman), Queen's Printer, Quebec, 1956, p. 249.

³³ [1957] Ex. C.R. 83; [1957] D.T.C. 1103.

exclusive jurisdiction of the provinces in the field of education. Mr. Justice Dumoulin found that it did not, and proceeded to set forth his concept of a "scholastic law" such as is contemplated by section 93:

Without attempting a definition, let us rather rely on normal experience for the answer. A scholastic law would be that which, in a given territory, sets out the organic scope of instruction, establishes the qualifications of the teaching body, details the elements of the curriculum, grades the diversification of studies, determines the official certificates: matriculation, baccalaureate and the degree of attainment which finally would decree the age and nature of scholastic attendance, such as, for example, the Public Education Act of the province of Quebec.³⁴

It is surprising, however, that Mr. Justice Dumoulin failed to make reference to the statement of Chief Justice Duff in the Adoption Act Reference.

Aside from the above cases and Royal Commission reports, there are no other authoritative definitions or statements which provide any assistance in circumscribing the field of education for purposes of this paper.

Recent Developments in the Constitutional Aspects of Educational Broadcasting

The term "educational broadcasting" would appear to be a constitutional paradox which creates an immediate jurisdictional conflict between the federal government and the provinces. Yet, despite the lack of definitive constitutional interpretations of either education or broadcasting, both levels of government have already made preliminary attempts towards the adoption of workable methods of jurisdictional division. The following are some of the recent constitutional developments in this field.

The Fowler Committee Report

The 1965 Fowler Advisory Committee Report devoted an entire chapter to educational broadcasting. It first stated its conception of the role of the federal government:

The Federal Government, although concerned neither with curriculum nor directly with cost, has an undoubted obligation, as the owner of the public sector of broadcasting and the controller of the private sector, to ensure that the facilities of the entire broadcasting system are placed at the disposal of the provincial educational authorities to the greatest practical extent.³⁵

³⁴ [1957] D.T.C. 1103, 1105.

³⁵ *Supra*, note 26, at 273.

The Committee then made an attempt to delineate the role of the provinces in respect of the educational aspects of broadcasting, as contrasted with the federal role:

Since the content in pedagogical aspects of scholastic broadcasts are constitutionally the responsibility of the provinces, they raise no serious problems. Some attention is necessary, however, to constitutional questions arising from the financing of scholastic broadcasting and from federal control and regulation of broadcasting in general. We are satisfied that these questions should present no serious difficulty. . . .

We do not think that the Federal Government should be called upon, or be willing to subsidize private or public stations for the transmission of scholastic broadcasts. It is quite clear, in our opinion, that CBC stations and private stations carrying scholastic broadcasting should be reimbursed in full for the direct and indirect costs of these services by the institutions or educational authorities to whom they are rendered.³⁶

The Federal White Paper on Broadcasting

The general recommendations of the Advisory Committee apparently were viewed with approval by the federal government. In its White Paper issued in 1966 by Secretary of State Judy LaMarsh, the federal government indicated an intention to proceed along the course recommended:

Federal policies in the field of communications must not work to impede but must facilitate the proper discharge of provincial responsibilities for education. For this purpose, it will be necessary to work directly with the provinces to study the technical facilities required, and to plan and carry out the installation of educational broadcasting facilities throughout Canada.

The Government is prepared to give immediate consideration to the creation of a new federal organization licensed to operate public service broadcasting facilities. This organization would be empowered to enter into an agreement with any province to make such facilities available for the broadcasting within the province, during appropriate periods of the day, of programs designed to meet the needs of the provincial educational system as determined by the responsible provincial authorities. As a component of the Canadian broadcasting system, the new organization would be subject to the authority of the Board of Broadcast Governors in respect of the licensing of stations, of the hours of broadcasting, the interpretation of its purposes, and generally the regulatory power of the Board in all matters affecting general broadcasting policy in Canada.³⁷

³⁶ *Id.*, at 277.

³⁷ Hon. Judy LaMarsh, *White Paper on Broadcasting*, Queen's Printer, Ottawa, 1966, p. 13.

The new Broadcasting Act passed in February 1968 contained the following as one of the provisions of a statement of broadcasting policy for Canada:

- (i) facilities should be provided within the Canadian broadcasting system for educational broadcasting;³⁸

Apparently, there was thought to be no necessity for extensive legislation at that time, the whole subject matter of broadcasting and televising of educational programs having been referred by the House to the Standing Committee on Broadcasting, Films and Assistance to the Arts on November 17, 1967.

The Standing Committee on Broadcasting, Films and Assistance to the Arts

The Standing Committee began its hearings in respect of this matter on February 8, 1968 with Mr. Robert Stanbury as chairman. Extensive hearings were held up to March 19, 1968. When the parliamentary session was prorogued shortly thereafter (April 26) and a federal election called for June 25, however, the Standing Committee ceased to exist as a Committee of the House.

It is significant that a number of excellent written briefs and oral submissions were made to the Committee prior to prorogation by several federal and provincial government officials and agents, educational organizations, and private individuals.

The first witness appearing before the Committee was the Honourable Judy LaMarsh, Secretary of State, who tabled a document entitled "Educational Broadcasting — Outline of Some Points for Possible Federal Legislation", a slightly revised form of which was eventually introduced into the House of Commons by Secretary of State Gérard Pelletier on March 10, 1969 as Bill C-179. Relevant portions of this Bill are attached to this paper as Appendix I. The document tabled by Miss LaMarsh was basically a draft piece of legislation prepared in accordance with the principles set forth in the White Paper issued in 1966. The draft legislation provided for the establishment of a new federal agency to hold licences, to operate educational broadcasting facilities, and to negotiate with provincial authorities for their use. The principal use of the proposed facilities would be for purposes coming under provincial jurisdiction. The provinces would have the responsibility for the production and programming of educational material to be broadcast over the federal facilities. As a consequence it would be expected that the task of pro-

³⁸ *Supra*, note 27, s. 2(1).

viding production facilities would therefore belong to provincial and other educational authorities. Thus, the federal government would have responsibility for transmission facilities only, and the provincial authority designated by each provincial government would have first claim on the facilities for the broadcasting of its own educational programs.

The draft legislation defined "educational programs" as having three primary characteristics: first, the objective of the systematic acquisition or improvement of knowledge; second, achievement of the objective through regular and progressive programming; third, results achieved to be subject to supervision (i.e., by means such as registration or enrolment, granting of credit towards a particular educational level or degree, or the examination of members of the audience on the content of the programs). Miss LaMarsh explained that the federal government had decided against using the CBC because, given the CBC's present responsibility for program activities, it would be imposing too much on the shoulders of that corporation to involve it in educational broadcasting which might entail conflicting responsibilities and activities.

The next major witness before the Committee was Mr. Pierre Juneau, then vice-chairman of the BBG and now chairman of the CRTC. In answer to a question from a committee member concerning the need for federal action to secure the utmost in provincial cooperation, Mr. Juneau replied:

. . . [I]t seems to me that there should be a way to take into account the jurisdiction that people seem to be very much concerned about in the field of education. As we know, the Departments of Education in at least some provinces are becoming very large operations. . . . But it seems to me that it should be possible to respect the emphasis that people put on this balance of jurisdiction and yet achieve a high degree of cooperation across the country. One sure thing is that if there is no cooperation, any objective and informed observer has to admit that it is difficult to predict what the result will be. It will not be pleasant.³⁹

During the early course of the Committee hearings, there was some attempt, led by Liberal member Gérard Pelletier, to restrict the Committee from hearing wide-ranging matters on the educational content of ETV on the grounds that this was a matter of exclusive provincial jurisdiction.⁴⁰ However, this view was rejected by the chairman with the

³⁹ Standing Committee on Broadcasting, Films and Assistance to the Arts, Minutes of Proceedings and Evidence (No. 9), February 12, 1968, at 198 (1968).

⁴⁰ *Id.*, February 13, 1968, at 230-231. Mr. Pelletier on July 13/1968 was appointed Secretary of State by Prime Minister Trudeau, with the responsibility for the CBC and broadcasting in general.

support of the majority of the Committee members. A very strong view in this respect was expressed by Liberal member Ron Basford:

It is argued because we are responsible as a national government for broadcasting and the provinces for education that we should be examining only the provision of a broadcasting facility and the question of hardware. I do not support that at all. As I say, we are being asked to spend \$50 million. Most of the members know very little about educational television. We have a right, and, in fact, a duty to find out exactly what we do with educational television if we are going to spend \$50 million on the facility. . . .

We have, so to speak, a duty to build up a record so the public can see from our discussions what is going on in Canada and what some of the considerations are in respect of ETV.⁴¹

In the same vein, the chairman Robert Stanbury stated:

. . . [T]his Committee should not be frightened into evading its responsibility for the public airwaves and for the expenditure which is being requested of Parliament because the subject matter which will be dealt with on the airwaves is, to a very large degree, within provincial jurisdiction. . . .

There is no way we can satisfy ourselves of the structure and policies the federal government should follow in the field of broadcasting, for the purposes of education, without knowing exactly what these purposes are.⁴²

Seven of the ten provinces also submitted briefs to the Committee, the three absentees being Prince Edward Island, Quebec, and British Columbia. Both Manitoba⁴³ and Saskatchewan⁴⁴ were content to leave the entire field of educational broadcasting with the CBC, through a new wing or special branch of the corporation. CBC experts would produce the programs, the province merely stipulating the educational content. This view would also seem to be acceptable to officials of the corporation itself as is indicated by their comments during the hearings.⁴⁵

On the other hand, Ontario and Alberta appeared to favour a much greater provincial involvement, particularly in the field of production. In this respect, briefs of these two provinces recommended a much broader definition of educational television programming than was set out in the draft legislation of the Secretary of State at the beginning of the hearing. New Brunswick⁴⁶ was concerned about the lack of financial

⁴¹ *Id.*, February 13, 1968, at 252.

⁴² *Id.*, at 253.

⁴³ *Id.*, March 5, 1968, at 543-555.

⁴⁴ *Id.*, March 7, 1968, at 650-655.

⁴⁵ *Id.*, March 14, 1968, at 699-728.

⁴⁶ *Id.*, February 22, 1968, at 327-362.

assistance from the federal government, and to this extent, it opposed the narrow interpretation of the British North America Act preventing the sponsoring by the federal government of valid closed circuit educational television pilot programs in schools of the province.

Alberta,⁴⁷ although primarily objecting to the federal government's views that ETV be restricted to the UHF band, put forth the following position respecting financial and constitutional matters:

It would . . . seem that the new federal agency could contribute to the cost of education in provinces without any infringement on constitutional privileges by providing educational television transmission facilities on a cost-free basis up to certain limits depending upon the size of the province, the number of students and geographical peculiarities.

An interesting exchange took place between Liberal member Ron Basford and the Alberta Minister of Education Mr. Reiersen with respect to federal financing of educational television:

Mr. Basford: . . . I state for the sake of argument that that policy by which the Federal Authority would build and own the transmission facilities, might not be the right policy. I am asking what the justification is for the federal government doing that. We do not assist with the financing of textbooks or school desks, or any other teaching tool. Why should the federal authority have to pay the capital cost of this new teaching tool [ETV]?

Mr. Reiersen: . . . The federal government has assumed certain other financial responsibilities for education rather than merely, shall we say, making available additional sums in federal-provincial fiscal arrangements, sums which the provinces could expend on whatever they liked. . . . The federal government assumes the total cost for certain areas of adult education that meet the qualifications necessary under the agreement with the Manpower Department. It also provides the total amount of training allowances under the same agreement. These various things, then, establish the fact that the federal government does pay for education. So whether it is the intent of the federal government to provide capitalization for these stations and then either provide the transmission at cost to provinces, provide them at no cost to the provinces, or provide them at some subsidized rate in between, all remains in a rather murky area of uncertainty. . . .

Mr. Basford: . . . What would be your reaction if the federal policy were simply to license non-political educational television?

Mr. Reiersen: Mr. Chairman, that would certainly be a direct decision on the part of the federal government in contradiction to its present policy.⁴⁸

⁴⁷ *Id.*, February 29, 1968, at 448-491.

⁴⁸ *Id.*, at 451.

On the same day of the hearings, Mr. Reiersen engaged in a discussion with Progressive Conservative member Dr. Lewis Brand:

Mr. Brand: We are dealing with education, which, constitutionally, is a provincial problem. Do you honestly think the federal government has any right to tell you how and where you should put up television stations within the confines of your province, so long as they do not interfere with other provinces?

Mr. Reiersen: . . . it has been so totally a prerogative of the federal government to hold hearings and to license, with a great deal of care, in the fields of radio and television that we were completely amenable to the idea that we make application after determining what we should do and that we are licensed should the federal authority be satisfied with the purposes to which we are going to put the station. . . .

We are completely in accord, Mr. Chairman, that the programming content, the actual curriculum, the areas that we would classify as educational television should be the responsibility of the provincial organization that would be undertaking educational television.

Mr. Chairman, it is our feeling that the federal government could lay down guidelines of a sufficiently broad concept on what would be classified as educational television that if there were flagrant breaches of them, then there would be reason for discussion. The actual licensing of transmitting stations, the allocation of frequencies and the determination of the availability of channels must certainly be controlled, and there is no objection on our part. We are prepared to cooperate in every way. However, we are concerned . . . that the actual educational content be left as the responsibility of the province.

. . . [I]t has to be stated that the federal government has taken unto itself total responsibility in this area of communications and has given no indication up to this time that it is prepared to relinquish any part of it; and we are prepared to live within it.⁴⁹

An extensive brief was submitted by the Ontario Department of Education, and presented at the hearings by Education Minister William G. Davis. The constitutional position of the province of Ontario is summed up in the following excerpts from the brief:

It is not the intention of the Ontario Government to argue the constitutional niceties of the situation at this time, particularly when a practical solution appears to be at hand.

Therefore, our present attitude is to accept the solution suggested in the White Paper on Broadcasting issued by the Federal Government in July of 1966, and reaffirmed before this Committee by the Secretary of State on February 8, 1968. . . .

⁴⁹ *Id.*, at 452-453.

The conversations that have been held by representatives of the federal and Ontario Governments have been based on the principles . . . from the White Paper. The Ontario government is willing to accept, in principle, this division of responsibility: —

that a Federal Authority erect, operate and maintain transmission facilities;

that a Provincial Authority be responsible for the production and programming of the educational material to be broadcast over these facilities.

Educational broadcasts, thus, become part of the structure and process of education within the province.⁵⁰

In the course of his formal presentation before the Committee, Mr. Davis made it very clear that Ontario was strongly opposed to the definition of “educational programs” contained in the draft legislation of the Secretary of State presented at the beginning of the hearings. In this context, Mr. Davis quoted the remarks of Chief Justice Duff in the Adoption Reference⁵¹ concerning section 93 of the British North America Act. During the definition discussion, Mr. Davis was asked for his general comments on the role of the federal Department of Manpower and the use of educational television. He replied as follows:

Mr. Davis: . . . [P]hilosophically it has been very difficult for us to accept the federal distinction between training and education. . . . Ontario has always taken the position that education should be looked at in its total context today and that is why I suggest the Committee should really look very carefully at the definition of education contained in the proposed legislation.

With respect to the method that might be used, assuming that the Federal Government continues its interest in manpower training as distinct from education, I see no difficulty . . . in . . . the Ontario educational television or broadcasting authority working in a cooperative sense. We really intend to be and, as I think we have demonstrated, we really are cooperative in the province of Ontario in the field of manpower-training and education because, in the final analysis, we all want to accomplish something. I think ways and means can be found whereby perhaps the federal Department of Manpower may say to us just as an example: “We have a course that we would like to see developed for manpower training that would relate to specific needs. Would you either produce or include this in your programming in the hours that are available?”⁵²

On questioning from Mr. Basford as to whether the federal government should be involved in transmission at all, Mr. Davis set forth Ontario’s pragmatic position:

⁵⁰ *Id.*, at 430-431.

⁵¹ *Supra*, note 30, at 402.

⁵² *Supra*, note 34, February 27, 1968, at 370.

If the federal government were to take the position tomorrow that they just had no interest in this, period, and that they would grant a license to any recognized authority making application, we would make an application tomorrow and be in business, I hope, very shortly thereafter; if the basis of our presentation to your Committee, Mr. Chairman, is the White Paper that suggested this division of responsibility.

I am not going to argue about whether or not it constitutionally was within the four walls of the various sections of the B.N.A. Act. We are prepared, as a government, to accept the situation set out in the White Paper, and to proceed from there. . . .

We would be delighted [if the federal government would provide the transmission facilities], because basically, in the final analysis, we want to achieve something in the field of education. If the federal government is prepared to provide some of the hardware we would not, quite frankly, regard this as an infringement on the educational responsibilities of the provincial jurisdiction.⁵³

Although there were a number of other briefs and submissions made to the Committee dealing with the constitutional aspects of educational broadcasting, they were largely repetitive of the positions that have already been stated. There was one other portion of the hearings, however, involving the Association of Universities and Colleges of Canada to which reference might be made. Liberal member Gérard Pelletier was questioning members of the Association concerning possible definitions of "educational programming" and whether or not "cultural programs" should be included. Doctor G. C. Andrew, Executive Director of the Association, replied:

We have been trying to say, in a sense, that we feel the CBC, the public broadcasting system, should continue to be responsible for public affairs, scientific and cultural broadcasting as in the past, and that the new institutions [the provincial ETV authorities] should start from the point of view of being specifically educational in the elementary and secondary senses of the word.

There is a point at which higher education becomes a cultural acquisition and this is the cause of your difficulty and our difficulty. If we have been vague, it is because we recognize that there is a coincidence of interest here. . . .

I hope that an overlap between educational and cultural will be recognized. We have spent too long in my opinion in trying to say that there is a knife-edge here, and I think, as a matter of fact, Mr. Tremblay [Jean-Noel Tremblay, Quebec Cultural Affairs Minister] has performed a service to the whole country by saying there is no knife-edge. Now, I think it is up to Parliament

⁵³ *Id.*, at 379-380.

to recognize that there is no knife-edge and to see that there is an overlap which they must try to deal with.⁵⁴

The Reappearance of Radio-Québec

On February 22, 1968, Premier Johnson of Quebec revived the 1945 Quebec Broadcasting Act⁵⁵ which had never been effectively implemented by the Duplessis Government of that date, by creating a new provincial administrative council called "Radio-Québec". Mr. Justice Guy Guérin was appointed chairman of the council. In his announcement, Premier Johnson stated that Radio-Québec would limit itself, at least for the time being, to ensuring for Quebec "the full exercise of its rights and powers in this sphere of education".⁵⁶

This announcement came directly on the heels of the statement of a more pervasive position by the Government of Quebec on the subject of radio and television at the Constitutional Conference in Ottawa on February 5-7, 1968:

Another area to which the Quebec Government attaches the utmost importance concerns media for the dissemination of education and culture, particularly radio and television. As things now stand, the provinces are a long way from playing the part that should normally be theirs in this field. Since frequencies are controlled by Ottawa, allocation of radio and television stations within Quebec boundaries was made without our Government being given the slightest voice in the matter. This situation results from the interpretation given by the Courts to our constitution, and is unacceptable to Quebec.

The changes required in this area will have to take into account the various components of broadcasting; we refer particularly to such organizations as the Board of Broadcast Governors and the Canadian Broadcasting Corporation. . . . Airwaves are rightfully considered to be in the public domain; they cannot and must not be the federal government's apanage. Just as program content, allocation of frequencies can have serious repercussions at the cultural level. Quebec cannot tolerate any longer being kept outside a field where her vital interest is so obvious, especially in view of the potential impact of audio-visual means of mass communication in educating both children and adults.⁵⁷

On February 26, 1968, the new chairman, Mr. Justice Guérin, announced that Radio-Québec would be ready in September 1968 to put on its first educational programs in the regions of Montreal and

⁵⁴ *Id.*, March 4, 1968, at 515-516.

⁵⁵ *Supra*, note 17.

⁵⁶ Unofficial translation of excerpts of an editorial in *Le Soleil*, February 24, 1968.

⁵⁷ Government of Quebec, *Brief on the Constitution* 15-16, presented to the Constitutional Conference, Ottawa, February 5-7, 1968.

Quebec City. He stated however, that it was still too soon to make a precise announcement about the methods of broadcasting or about the nature of program content. But he did point out that Radio-Québec was prepared to use a number of existing private television stations so as to dispense with the necessity of obtaining a broadcasting licence from the CRTC and the Department of Transport. Mr. Justice Guérin emphasized that Radio-Québec should not be regarded as a competitor of other private broadcasting companies or the CBC, but as an eventual "collaborator".⁵⁸

Whether Radio-Québec limits itself to the educational field is a matter of some speculation at this juncture. The 1945 legislation under which it was created provides for somewhat more extensive powers. Premier Johnson at the February 1968 Constitutional Conference referred to the "dissemination of . . . culture" and "serious repercussions at the cultural level" as being as much matters of provincial concern as the field of education. Claude Ryan in an editorial in *Le Devoir*⁵⁹ commented that Radio-Québec was authorized to take initiatives concerning the whole vast field of radio and television, and that there was nothing to prevent it from taking the initiative in the domain of general programming. Another journalist, Florian Sauvageau, commented editorially in *Le Soleil* that Mr. Johnson was attempting to bring culture under provincial authority through the extension of the province's jurisdiction over education, but that some problems might be created if in future years Quebec were to attempt to set up a television-radio network of its own.⁶⁰ Indeed, former Prime Minister Lester Pearson noted at the Constitutional Conference in February 1968 that even if television was an area which concerned the French culture and the interests of Quebec, it did not necessarily follow that the federal government should have no right to take initiatives in the domain of broadcasting and culture. In Mr. Pearson's view, culture was not the exclusive prerogative of the provincial governments.

In any event, on March 27, 1969 Premier Bertrand introduced a new Bill in the Quebec Legislature, Quebec Bill 11, the Quebec Broadcasting Bureau Act. The effect of this Bill was to update the 1945 Act under which Radio-Québec was established. It is worth noting certain provisions under the new Act which became law in October 1969:⁶¹

(This bill proposes a complete revision of the act which incorporated Radio-Québec.

⁵⁸ See *La Presse*, February 27, 1968; *Le Soleil*, February 28, 1968.

⁵⁹ *Le Devoir*, February 29, 1968.

⁶⁰ *Le Soleil*, July 11, 1968.

⁶¹ Assented to on October 17, 1969; to be cited Stats. Que. 1969, c. 17.

It provides for the establishment of a body called the "Québec Broadcasting Bureau" which will be composed of five members, including a full-time president who will be the general manager, and a full-time vice-president appointed for ten years, and three other members appointed for three years.

The objects of the Bureau will be to establish, possess and operate a service for radio and television broadcasting called Radio-Québec; its principal functions will be to prepare radio and television programs and audio-visual material for educational purposes, to co-ordinate audio-visual production by government departments and services and the acquisition of the necessary equipment, and to advise any person who receives a grant from the government respecting the production of audio-visual material and the acquisition of the equipment required for such purpose....)

Functions of the Bureau

21. The objects of the Bureau shall be to establish, possess and operate a service for radio and wire broadcasting and for producing and broadcasting audio-visual material, called "Radio-Québec".

22. The principal functions of the Bureau shall be the following:

(a) to prepare radio programs, wired broadcasts and audio-visual material for educational purposes, and to ensure the broadcasting thereof, upon the application of the departments and bodies of the government and in collaboration with them;

(b) to obtain by purchase, exchange or otherwise, and, for the carrying out of its functions contemplated in paragraph a, to use audio-visual or other material, copyrights, trade marks, patents of invention, permits or concessions;

(c) to co-ordinate the production and broadcasting of audio-visual material for educational purposes and the acquisition and use of the equipment necessary for the production and broadcasting of such material by the departments and services of the government and by the bodies appertaining thereto;

(d) to advise any person or body not contemplated in subparagraph c, who or which receives a grant from the government, on the production and broadcasting of audio-visual material for educational purposes and on the acquisition and use of the equipment necessary for the production and broadcasting of such material.

The Bureau, by regulation, shall fix standards for the application of paragraphs c and d.

23. The Bureau may erect stations for radio or wire broadcasting and provide such stations with all the equipment which it deems suitable.

It may also acquire, by agreement or expropriation, any station for radio or wire broadcasting and any immoveable or

real right which it deems necessary for establishing new stations; it may also alienate the property so acquired.

24. The Bureau may acquire, hold or alienate shares of the capital stock of any corporation carrying on any business which, in its opinion, would be useful for the attainment of its objects.

25. The Bureau shall not exercise the power of expropriation assigned to it by section 23 except with the previous authorization of the National Assembly of Québec.

It shall not exercise the other powers assigned to it by sections 23 and 24 except with the previous authorization of the Lieutenant-Governor in Council.

The powers given to the Bureau under this Act are obviously much wider than those contemplated for a "provincial authority" under Bill C-179 of the federal government (see Appendix I). However, programs produced by the Bureau must still be transmitted by stations licensed by the CRTC — that is, by the CBC, CBC affiliates, or private stations. Whether the CRTC will ever see fit to grant licences directly to the Bureau makes interesting speculation in view of the wide powers in the field of broadcasting granted to the Bureau by section 23 and the tight control over the Bureau to be exercised by the Quebec Government by virtue of section 25 and other provisions (not reproduced) in the Bill. In the short run, at least, it is still the federal government's declared policy to deny broadcasting licences to the provincial governments of their agents.

Less than one month after the Quebec Broadcasting Bureau Act became law in that province, the federal government on November 5, 1969 announced in the House of Commons that it no longer planned to proceed with Bill C-179 (*An Act to Establish the Canadian Educational Broadcasting Agency*) which it had first introduced on March 10, 1969. The Honourable Gérard Pelletier, Secretary of State, explained in the House that this step was being taken because of the necessity for interim action requested by the provinces of Alberta and Ontario and as a result of significant technological changes which had occurred since the White Paper of 1966. After citing the impossibility of arriving at a general approval satisfactory to all provinces in the field, Mr. Pelletier outlined the following interim measures to be taken by the federal government:

(1) The Canadian Radio-Television Commission will be directed, pursuant to section 22 of the Broadcasting Act, that in provinces where the provincial authorities desire cable transmission facilities, as a condition for all new cable licences, and for the renewal of existing cable licences, the licensees shall be required to set aside at least one channel for educational programming. By this action, the government assures access to this mode of transmission for educational broadcasting. . . .

(2) Furthermore, the government has decided that in cer-

tain situations, the C.R.T.C. may recommend to the government to direct the C.B.C. to act as its agent pursuant to section 39(2) of the Broadcasting Act, in providing, on a recoverable cost basis, the transmission facilities for educational broadcasting.

(3) Because of the importance of educational broadcasting, discussions with the provinces in this area, and in particular on the definition of educational broadcasting will be held under the aegis of the Secretary of State. In addition, the Department of Communications will be available to assist provinces that desire advice on technological changes, and will coordinate the necessary studies on transmission systems within the government.

The government has decided to continue its policy of not granting provincial governments or their agents broadcasting licences. The government intends to issue a formal direction to the Canadian Radio-Television Commission to this effect.⁶²

It is not yet clear whether this latest position represents a retreat from earlier constitutional principles espoused by the federal government, or is merely a pragmatic short-run solution to a difficult financial problem in which the federal government would otherwise have been required under Bill C-179 to expend over \$50 million for transmission facilities which are now obsolete in the light of recent technological developments. However, it is important to note that in having the CBC provide transmission facilities to provincial authorities as its agent under this policy position, the federal government would require this sort of arrangement to be carried out *on a recoverable cost basis*.

A significant invocation of this new policy position by the CRTC was the approval on January 30, 1970 of an application by the CBC for a licence to provide transmission facilities for educational programs in Toronto on UHF Channel 19.⁶³ This licence application was both made by the CBC and approved by the CRTC, on the basis that the programming would be provided by the Ontario Department of Education or an Ontario provincial authority to be established in the future. The licence is for a period of five years. The capital costs of the transmission facilities, estimated at \$630,000, will be shared according to an agreement reached between the federal government and the Government of Ontario shortly after the approval of the licensing application. Details of this agreement have not yet been made public, although it would appear that the bulk of the capital cost will eventually be paid by Ontario since the federal government can be committed to an agreement only on a recoverable cost basis. Relocation of the transmitter on a permanent site will cost an additional \$340,000 and presumably this sum will be subject to the same

⁶² *Hansard*, November 5, 1969, at pp. 533-534.

⁶³ Decision C.R.T.C. 70-72.

arrangement between the two governments. Programming and operating costs, which will be in excess of \$3 million annually, will be borne by the Ontario Department of Education as part of its annual ETVO budget which for 1970 is \$7.5 million.⁶⁴ It is estimated that Channel 19, starting September 1, 1970, will be viewed as far away as Kitchener, Barrie, St. Catharines, Hamilton, and Oshawa, and thus will have a potential audience of approximately 45 per cent of Ontario's population. Stations outside this area from London to Kingston also may be brought in through cable systems. However, because Channel 19 will reach only those persons with television sets capable of receiving UHF signals or connected to a cable system, it is expected that most of the viewers initially will be elementary and secondary school students during the day, with some adult and pre-school viewers at other times.⁶⁵

As for Ontario's plans for the future, there will be four more transmitters in the province: at Ottawa, Thunder Bay, Sudbury, and between Windsor and London.⁶⁶ Presumably these will be on the same basis as Channel 19 — with the CBC as licence holder, capital costs shared between the two governments (but with the federal share recoverable) and with Ontario paying the operating and programming costs. It is expected that Ontario will soon establish an Educational Communications Authority as an independent agency to take over existing ETV operations in the Department of Education and to provide the programming for the new stations. In fact, Bill 43 to this effect was introduced in the Legislature by Minister of Education William Davis on March 19, 1970. (See Appendix II.) It is significant to note that the Bill's provisions basically direct the Authority to concern itself with programming, and that there is no provision for the Authority to hold broadcasting licences or to operate broadcast facilities.

An earlier anticipatory application of the new federal policy position stated by Mr. Pelletier on November 5, 1969 was the CRTC approval of a CBC application for the use of Channel 11 in Edmonton for educational programs.⁶⁷ This channel will be shared between the Metropolitan Edmonton Educational Television Association (MEETA) and a new CBC French-language station.

MEETA is dependent on twenty-eight school jurisdictions within its area for financial support as well as on the Alberta Department of

⁶⁴ *Legislature of Ontario Debates, Standing Committee on Supply*, November 13, 1969, at pp. 335-336.

⁶⁵ News Report, by Jack Miller, TV Editor, the *Hamilton Spectator*, January 31, 1970.

⁶⁶ Article entitled "The Rocky Road to an E.T.V. Dream", by Jack Miller, TV Editor, in the *Hamilton Spectator*, January 31, 1970.

⁶⁷ Decision C.R.T.C. 69-262.

Education and the University of Alberta. Like the Ontario situation, the licence for Channel 11 is held by the CBC, with capital costs being shared by MEETA and the federal government (but with the federal share recoverable) and with MEETA paying the operating and programming costs for the time it uses. It is estimated that Channel 11, which began broadcasting on March 1, 1970, will cover an area within a sixty-mile radius of Edmonton with cable providing a potentially broader range.⁶⁸ The licence granted to the CBC for Channel 11 educational broadcasting is for a period of three years.

The Key Issue: The Problem of Defining "Educational Programs"

Throughout recent constitutional discussions on the subject of educational broadcasting, both in the Standing Committee and elsewhere, the central issue has been not so much whether to allow provinces to proceed with broadcasting under their constitutional mandate in the field of education, but exactly what type of proposed provincial broadcasting activity constitutes "education" in the legal and practical sense of the word. For example, one might consider formal education of a scholastic nature: in-school instruction at the elementary, secondary, and university levels. Or one might consider vocational training and trade schools, or non-credit adult education in the home or the school. Finally, one might consider education in its broadest sense: drama, music, public affairs, news, and sports.

In attempting to define "education" in terms of broadcasting, one must consider not only the subject matter but also the medium of transmission. The variables here are numerous. For example, educational broadcasting might be transmitted over available VHF bands (as is the case with MEETA in Alberta); or it might be transmitted over the much more complex UHF bands once transmitting and receiving facilities are made available (as will be the case with Channel 19 in Toronto). Educational broadcasting can be transmitted over the 2500 Megahertz band for in-school broadcasting (as is the case in such places as London, Ontario and Calgary), over existing and future coaxial cable systems (used in most provinces but most extensively by Radio-Québec), or through videotape systems. Finally, as technology develops, new media of transmission, such as satellites and electronic video recording, will provide further broadcasting methods of instruction.

At the outset, a word should be said about receivers in the field of

⁶⁸ *Edmonton Journal*, January 16, 1970.

educational broadcasting. Taking the development of technology in its present state, the only media which can be used for transmission of educational broadcasting into *private homes* are the VHF bands and present community cable systems. All other methods of transmission today are useful only in schools and other educational institutions where the necessary receiving equipment is located; to that extent they are limited in their possible uses. Of course, in the very near future, the UHF band will be opened up and the majority of home receivers will probably be converted so that receipt of these signals is possible. In fact, on July 10, 1968, Secretary of State Gérard Pelletier announced that the federal government would provide seventy UHF channels to be used for educational broadcasting.⁶⁹ But the uses of any of the other methods of transmission into the home are only theoretical at this stage, and have yet to be developed on a large-scale basis. Therefore, the broadcasting methods in which the provinces are most interested and which are the most universally accessible are VHF and UHF bands and coaxial cable systems. Any recommendations should be considered in the light of this fact.

The succeeding sections of this chapter attempt to provide a review of the numerous definitions of "educational programs" which have been the subject of considerable discussion in recent years in Canada. The importance of these definitions is emphasized by the fact that the one that is permanently agreed upon by the relevant provincial and federal authorities will, to a large extent, determine the nature of the division of authority between the two levels of government and their agencies.

General Definitions

The British White Paper, 1962

In July 1962, the British government issued a White Paper as a result of a report made earlier the same year by a Royal Commission on Broadcasting known as the Pilkington Commission. Commenting on educational television, the authors of the White Paper stated:

While the Government fully agrees that television can do a great deal more for education, it considers, as do the Committee, that such programmes will best be provided as part of the general programmes and that it would be a mistake to hive them off, at this stage at least, into an entirely separate programme insulated from the attractions of television in general.⁷⁰

⁶⁹ Toronto *Globe and Mail*, July 13, 1968.

⁷⁰ See Albert E. Shea, *Broadcasting: The Canadian Way*, University of Toronto Press, Toronto, 1963, p. 96.

This view was subscribed to by an authority on Canadian broadcasting, Albert E. Shea, who commented in 1963:

Education should be a part of the daily television schedule, not a ghetto or an annex of television.⁷¹

The Fowler Committee, 1965

In 1965 the Federal Advisory Committee on Broadcasting (the Fowler Committee) adopted a definition of educational broadcasting which consisted of four distinguishable but overlapping elements:

Scholastic Education covering formal school and university programmes, both for children and adults, together with supplementary material particularly designed to broaden and enrich the curriculum;

Vocational Training comprising courses directed to adolescents and adults to qualify them for, or develop additional skills in, specific gainful but not professional occupations of all kinds;

Special Enlightenment covering courses and programmes for people of all ages beyond infancy, to popularize and develop skills in or knowledge of specific arts, crafts, hobbies, and sciences;

General Enlightenment comprising the humanities in general and the broad improvement of the mind.⁷²

The Advisory Committee pointed out that adult education was to be considered as overlapping the whole spectrum of broadcasting activities above.

Educational Television Conference in Newfoundland and Labrador, 1966

At an Educational Television Conference held in St. John's, Newfoundland in September 1966, Dr. Lewis Miller of Scarborough College, Toronto, presented a paper on "Governance" of educational broadcasting. In attempting to draw boundaries to confine the word "education", Dr. Miller noted the following six programming categories:

1. Primary, elementary and secondary school,
2. Vocational and Trade Schools,
3. Teacher training,
4. University,
5. Non-credit instructional programming at the following levels:
(a) pre-school, (b) Children and Youth, including schools "enrichment" programming, and (c) Adult,

⁷¹ *Id.*

⁷² *Supra*, note 26, at 271-272.

6. Educational programming in the broadest sense of the word "education", to include drama, music, public affairs, news, sports and weather.⁷³

Federal Proposal for Draft Legislation, 1968

On February 8, 1968 the then Secretary of State Judy LaMarsh placed before the Standing Committee on Broadcasting, Films and Assistance to the Arts a proposal in the form of draft legislation, a slightly revised form of which was eventually introduced into the House of Commons as Bill C-179 on March 10, 1969, and later withdrawn on November 5, 1969 (see Appendix I). Bill C-179 would have established a corporation to be known as the Canadian Educational Broadcasting Agency for the purpose of facilitating educational broadcasting in Canada by providing operating facilities for the broadcasting of educational programs for or on behalf of provincial educational authorities, and educational organizations and institutions. The term "educational broadcasting" was defined as "broadcasting of educational programs". The most important provision in Bill C-179, for present discussion, is the definition of the term "educational programs" (the parts of the definition in the draft legislation proposed by Miss LaMarsh which were replaced in Bill C-179 are indicated in parentheses and are replaced by the words in double quotations):

2(d). 'Educational programs' means programs that are designed to be presented "in a structured context" (on a regular and progressive basis) to provide a continuity of "learning" (program) content aimed at the systematic acquisition or improvement of knowledge by members of the audience to whom such programs are directed, and under circumstances such that the acquisition or improvement of such knowledge *is subject to* supervision by "any appropriate means", including (means such as)

- (i) the registration or enrolment of members of such audience in a course of instruction "that" (which) includes the presentation of such programs,
- (ii) the granting to members of such audience of credit towards the attainment of a particular education level or degree, or
- (iii) the examination of members of such audience on the content of such programs or on material of which that content forms a part,

and 'educational program material' has a corresponding meaning;
(Emphasis added.)

Ontario Department of Education, 1968

At a later point in the hearings of the Senate Committee, Ontario's

⁷³ *Educational Television Conference in Newfoundland and Labrador, 1966: Abstract of Proceedings* 143 (Miller ed., Sept. 6-9, 1966).

Minister of Education Mr. Davis, objected to the federal definition in the draft legislation presented by Miss LaMarsh:

. . . [W]e feel very strongly that the definition as contained in the draft legislation does not include what we feel should be the total educational situation in the year 1968 and beyond. It might have been the case twenty years ago, but I certainly do not believe it to be the case at the present time, and I very earnestly suggest that your Committee direct some very specific and, I hope, broad thinking to the question of definition of educational television and broadcasting as is outlined in the draft bill. I think it is really very relevant.⁷⁴

During questioning by some of the Committee members as to what definition he would favour, Mr. Davis replied that he would undertake to provide the Committee with a revised definition which was acceptable to the province of Ontario. This definition was eventually sent to the chairman of the Committee, Robert Stanbury, on March 18, 1968, shortly after the Committee had completed its public hearings:

2(c). "educational broadcasting" is the broadcasting of programs within the meaning of education as a constitutional jurisdiction.
2(d). "Programs for educational broadcasting" means programs that are designed to be presented on a regular and progressive basis, to provide a continuity of program content aimed at the systematic acquisition or improvement of knowledge by members of the audience to whom such programs are directed, and under circumstances such that the acquisition or improvement of such knowledge and the results achieved by the participants in the program must be *capable of being ascertained* by examinations or by some other means of supervision and checking.

(Emphasis added.)

These definitions establish more clearly that education is the exclusive responsibility of the provinces. They also present a less complex and rigid set of methodological requirements for "educational programs" than the federal definitions. Thus, to an extent, they give the provinces a more certain control over program content.

To date, there has been no official federal reaction to these Ontario definitions. Bill C-179 appears to have ignored them, at least insofar as the constitutional issue and the requirement that educational programs be "*subject to supervision*" (rather than "*capable . . . of supervision*") are concerned.

⁷⁴ Standing Committee, February 27, 1968, at 369.

The Need for a Feedback Relationship

A number of submissions to the Standing Committee emphasized the need for a two-way or feedback relationship between broadcaster and student as a prerequisite to valid "educational broadcasting". This point was particularly emphasized during the presentation of Pierre Juneau (then, the vice-chairman of the BBG; now the chairman of the CRTC). Mr. Juneau referred in particular to the position of the European Broadcasting Union formulated at its International Congress in 1967:

What distinguishes these broadcasts from others is the systematic acquisition or improvement of knowledge, the regular and progressive programming, the use of supporting documents and manuals and the act of participation of the student, confirmed by examinations if possible, and at any rate, by the control and verification of the results.⁷⁵

Reference was also made by Mr. Juneau to a similar definition by the British Broadcasting Corporation, and to certain comments by the director of the TEVEC program in Quebec and also of the Tremblay Report in 1956⁷⁶ concerning the need for a reciprocal or feedback relationship in a viable educational situation.

This feedback requirement cited by Mr. Juneau is, of course, a key element of the federal definition in the draft legislation which prescribes that "the acquisition or improvement of such knowledge [be] subject to supervision. . . ." This is the element which will go the furthest in distinguishing "educational broadcasting" from "general broadcasting". Feedback was also regarded as an essential requirement by Mr. Howard Mountain, a North York teacher and educational broadcaster who made the following submission to the Standing Committee:

Responsibility of any authority charged with the control of educational mass media is to ensure that any and all programs provided by these media have as their *raison d'être* the product of a most broad-based deductive impartial organization with equal capacity for a *continuous assessment of its effects* and perfection of its techniques, as well as justification for its offerings, not only as education but as mass media itself.⁷⁷

(Emphasis added.)

Mr. Mountain then proceeded to establish as the first priority in educational broadcasting those programs which were "sequential, accredited and rewarded". Thus he was able to agree with the definition of

⁷⁵ *Id.*, February 8, 1968, at 176.

⁷⁶ *Supra*, note 9.

⁷⁷ Standing Committee, February 13, 1968, at 226.

"educational programs" proposed by the federal government in its draft legislation.⁷⁸ Presumably, he would also have agreed with the Ontario definition (had it been submitted at that time) which provided for "supervision and checking" (feedback) as well, but of a less complex and rigid nature than the federal definition.

Groups Favouring a Broad Definition of "Educational Programs"

One of the great benefits of the hearings of the Standing Committee was to provide an effective forum for all groups, including governmental officials, educators, and private individuals, to present their views on the subject. Both in the formal briefs presented by many of these groups and by means of questions asked by Committee members, the key issue of definition received considerable attention. The views which follow represent a summary of opinions expressed by various groups favouring a broad definition of "educational programs".

The Canadian Home and School and Parent-Teacher Federation recommended that the subject matter of educational television "include both direct teaching and enrichment programs" and that "priority be given to educational television at all levels; pre-school, primary, elementary, secondary, community college, university and adult".⁷⁹

An inter-church group representing the Anglican, Roman Catholic, and United churches in Canada presented a brief in which they urged that "the definition of educational broadcasting include general cultural and informational programming as well as instructional material", and that it not be limited to "narrowly defined student instruction".⁸⁰

The Alberta Department of Education noted that "direct instruction, credit courses or general interest courses for people at home can be given by means of television in subjects related to scholastic institutions or in the realm of general continuing education".⁸¹ The Minister of Education, Mr. Reiersen, noted that educational television should embrace "the whole spectrum of what could be classified as adult education", and that his province was concerned "in the upgrading of courses in the home by adults, perhaps trade training opportunities, perhaps language instruction, various areas of actual adult education per se without thinking in terms of just the cultural upgrading".⁸²

The Association of Universities and Colleges of Canada recom-

⁷⁸ *Id.*, at 240.

⁷⁹ *Id.*, February 15, 1968, at 298.

⁸⁰ *Id.*, February 20, 1968, at 313.

⁸¹ *Id.*, February 29, 1968, at 487.

⁸² *Id.*, at 447.

mended that "educational programs" in the draft federal legislation should be defined so as to mean:

... programmes that are designed to provide a continuity of programme content aimed at the systematic acquisition or improvement of knowledge by members of the audience to whom such programmes are directed, and, whenever possible, under circumstances such that the acquisition or improvement of such knowledge is capable of being supervised.⁸³

Dr. F. B. Rainsberry, an educational broadcasting expert called by the Standing Committee to give expert evidence, noted that if the definition in the draft federal legislation were adopted, there would appear to be no room for the production of general enrichment programs except as arranged by the new Canadian agency on the existing networks of the CBC or CTV. He also pointed out that the definition of ETV programming formulated by the International Conference on School Broadcasting in Paris, which was stated by the Secretary of State to be the basis for the federal definition, "was never strictly adhered to, not only at that conference but at previous ones . . . and from the beginning enrichment programs . . . were discussed and were an essential part of it along with adult education".⁸⁴

Dr. Rainsberry, however, seemed to envisage a greater role for the federal broadcasting agency in this wide view of educational programming, restricting the responsibility of the provinces to in-school instructional programs.⁸⁵

Groups Supporting a Narrow Definition of "Educational Programs"

The Canadian Teachers' Federation, through a number of its spokesmen before the Standing Committee, indicated that it would restrict the term "education" to in-school situations. The president of the Federation, Rev. J. Harold Conway, indicated the following view in a discussion on the meaning of section 93 of the British North America Act and the field of broadcasting:

I think on this particular issue we have to be restrictive in the meaning of education, because we are going by the B.N.A. Act and it is restrictive to topics that are directly related to education within the school and university systems. . . .

I feel that if you are going to take it in the broad sense, well, then everything is educative. Everything is formative in one way

⁸³ *Id.*, March 4, 1968, at 507.

⁸⁴ *Id.*, March 7, 1968, at 627.

⁸⁵ *Id.*, at 635, 643.

or another, whether for good or for evil, depending upon your value judgment.

I think if we do not put some restriction on it the whole gamut of every TV programme is available. Everybody can put up a case for some particular programme, so I feel that the only suggestion I can make is that education in this particular context has to be interpreted in a rather narrow sense.⁸⁶

The New Brunswick Department of Education favoured a narrow definition of "educational programming" to the extent that it objected to an interpretation of section 93 of the British North America Act which "prevents the sponsoring by the federal government of valid closed-circuit educational television pilot programs in schools of the province".⁸⁷ In other words, New Brunswick contemplates a major role for the federal government in the broad field of "education", and therefore would favour a narrow definition of "educational programs" insofar as that type of broadcasting activity would be controlled by the provinces. For example, one of the New Brunswick officials appearing before the Standing Committee (Mr. St. Onge) admitted that adult education in the form of vocational retraining "would probably be outside the Department of Education's responsibility".⁸⁸

The newly appointed president of the CBC, Dr. George Davidson, indicated some of the difficulties which the corporation had experienced in making a distinction between "educational" broadcasting and other forms of broadcasting. In commenting on the nature of a two-part drama on Louis Riel which the CBC had produced a number of years earlier, and whether it should have been labeled "education" or not, Dr. Davidson noted:

[This illustration] really shows the difficulty of drawing a clear cut definition between enrichment kinds of educational programmes and what you might call high-level entertainment or low-level entertainment. It is only when you begin to introduce the instructional element into the programme that you really can identify with complete clarity the point that is educational broadcasting in the sense that most of us would recognize it. It is that which prompts us, when we are preparing anything for what we know to be part of the educational programmes of the schools, to consider it essential that that be a matter of the closest consultation and collaboration with provincial authorities.⁸⁹

Thus, it would appear that Dr. Davidson and the CBC would find it to be a convenient delineation of "educational programming" to have an

⁸⁶ *Id.*, March 5, 1968, at 561.

⁸⁷ *Id.*, February 22, 1968, at 353.

⁸⁸ *Id.*, at 336.

⁸⁹ *Id.*, March 14, 1968, at 716.

"in-school instructional" requirement. Perhaps the "instructional element" of which Dr. Davidson spoke might be possible in some forms of broadcasting going into the home, although this was not made clear during the hearings.

A similar observation might be made with respect to the definition of "educational programs" in Bill C-179 introduced by the Secretary of State on March 10, 1969. As a practical matter, it would seem that the extent of supervision required in that federal definition (registration or enrolment, or granting of credit towards an educational level or degree, or examination on content) would effectively preclude any substantial "educational programs" being directed into the home, but would simply envisage in-school instruction at all levels. The Ontario definition, on the other hand, provides for a much more flexible supervision such as might allow pre-school educational programs directed into the home or adult and vocational retraining programs. With the Ontario definition, supervision would be possible at the "transmitting" end, as well as at the "receiving" end contemplated by the federal definition (i.e., registration in a course; granting of credit; examination on the content of programs). Examples of the type of supervision that could be carried out at the "transmitting" end are telephone surveys, mail questionnaires, or door-to-door spot checks within a particular viewing area. These are means of supervision which would not apply to each and every recipient of a program yet would seem to be permissible means of "supervision" according to the Ontario definition insofar as the programs would be *capable* of being supervised.

Another difficulty with the federal definition in Bill C-179 is that the three examples of supervision given (i.e., registration in a course; granting of credit; examination on the content of the programs) might be construed as the only means of supervision possible.

Conclusion on the Definition Question

In any event, following the federal government's announcement of the withdrawal of Bill C-179 and the statement of its new policy position on November 5, 1969 (see p. 214, *supra*), the Secretary of State and the Council of Ministers of Education (with representation from each of the provincial governments) worked out in December 1969 a definition acceptable to the federal government and all the provinces for purposes of implementing the new policy. In considering this new definition, it should be noted that it applies only to cable transmission facilities and broadcasting transmission facilities licensed (for educational programs in whole or in part) by the CRTC, and thus controlled ultimately by this federal

tribunal. The question of an acceptable definition under any other sort of arrangement not involving the CRTC or another federal agency would have to be regarded as still open, although such other arrangements might well be considered merely hypothetical in time.

The new definition for the CRTC's guidance in the reservation of educational time and facilities is as follows:

Where, within its jurisdiction, the Canadian Radio-Television Commission, on the direction of the Governor in Council, stipulates that at least one channel of a cable transmission facility be set aside for the use of a provincial authority for educational broadcasting or where the Canadian Broadcasting Corporation acts as agent of Her Majesty in right of Canada in providing a transmission facility for use of a provincial authority for educational broadcasting, the time reserved on such channel or transmission facility for the provincial authority shall be used for broadcasting the following types of programming.

1. programming designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition or improvement of knowledge or the enlargement of understanding of members of the audience to whom such programming is directed and under circumstances such that the acquisition or improvement of such knowledge or the enlargement of such understanding is subject to supervision or assessment by the provincial authority by any appropriate means;
2. programming providing information on the available courses of instruction or involving the broadcasting of special educational events within the educational system.

'Provincial authority' in relation to any province means such person, body or authority as may be designated by the Lieutenant-Governor in Council of that province as the provincial authority for that province for the purposes of this definition.

The intention of the above provision is to ensure that such programming, taken as a whole shall be designed to furnish educational opportunities and shall be distinctly different from general broadcasting available on the public or private channels.

It is clear that this most recent definition agreed on by all the provinces and the federal government for purposes of CRTC administration is much broader than the definition in Bill C-179, or that suggested by the Secretary of State before the Standing Committee on Broadcasting, Films and Assistance to the Arts. By adding the requirement of "assessment" as an alternative to "supervision", and by deleting the specific and rigid methods of supervision or assessment, provincial authorities will be left with a much freer hand in broadcasting educational programs to persons in "out-of-school" situations while at the same time providing for some form of feed-back relationship considered so essential to most accepted

concepts of "educational broadcasting" (as opposed to "general broadcasting"). And this definition is expanded to include the broadcasting of special educational events within the educational system, or information on available courses of instruction. Yet this broader definition was not achieved by the provinces without paying a price. Not only must the provincial authorities now remain subject to the ultimate control of the CRTC in respect of cable transmission and the control of the CBC as agent of the federal government (acting under the direction of the CRTC) in respect of broadcasting transmission (and this control would presumably include the "policing" of the definition), but the provincial authorities will ultimately have to pay the bulk of the capital cost of any new transmission facilities, both cable and broadcasting, since cable licensees will unlikely set aside one educational channel gratuitously and the federal government will provide new broadcasting facilities only on a recoverable cost basis.

However, the new definition appears to be more in accord with the provinces' exclusive constitutional jurisdiction in the field of education, and on balance, perhaps this is the most important factor. The provinces require the utmost in flexibility in attempting to carry out their responsibilities in this field. As long as they are each given a viable "broadcasting framework" by the federal government or its agency within which they can freely determine educational and pedagogical broadcasting priorities according to the particular and distinct needs of their residents, then surely it is logical for the provinces to put up the bulk of the capital funds for this governmental activity. And if provincial tax revenues are insufficient for this purpose, then new methods must be found of transferring public revenues to the provinces, whether through the federal government releasing some of its taxing power, through direct federal grants or through shared cost arrangements. This financial question, of course, is part of a much larger discussion which is at the heart of the present constitutional review being undertaken by the continuing Constitutional Conference, and is beyond the scope of this paper.

Suffice it to say here that the recent federal policy position would seem on the surface to suggest that if the provinces want the responsibility inherent in a broad definition, they can have it if they are willing to pay for it. This might well mean that the federal government no longer plans to spend \$50 million on ETV transmission facilities as originally planned, which will represent quite a bargain for Ottawa. While this might not constitute a major problem for provinces like Ontario and Alberta which have already proceeded under the new policy, it well might create substantial problems in the less wealthy provinces and effectively deprive their residents of the benefits of educational

broadcasting, in the near future at least. Of course the new policy position does provide for the CBC, as agent of the federal government, to provide the cost of the transmission facilities initially, but this is to be done on a recoverable cost basis. An agreement between a province and the federal government might conceivably provide for a long pay-back period and include provisions for the forgiveness of portions of the federal contribution, but this sort of arrangement would be nothing more or less than a shared cost program in disguise, the very sort of arrangement which Prime Minister Trudeau, at the Constitutional Conference on February 11, 1969, stated that the federal government was moving away from because it had the effect of determining certain provincial priorities in a way which was not acceptable to some provincial governments. This is not to suggest that shared cost arrangements for the capital costs of educational broadcasting facilities would necessarily be undesirable, just that in the broader constitutional context they should be recognized for what they are.

Related to the definition and financial matters above is the question whether the "broadcasting framework" provided by the federal government for educational broadcasting is indeed a viable one within which each of the provinces can effectively carry out its constitutional responsibilities. This question has both a provincial and federal perspective. At the provincial level the new policy position allows for cable or broadcasting transmission facilities to be set aside for the use of a "provincial authority". Although this term is later defined as "such person, body or authority *as may be designated*" (emphasis added) by the Lieutenant Governor in Council, it is obvious that the intention of the federal government is that provincial powers in this field be exercised by a body independent of the provincial government. In my view, this is what is implied by the use of the word "authority", and so it should be. A provincial authority with independent powers, term appointees from outside the government on its board of directors, and a fixed budget each year is certainly not too much to ask in order to guarantee that educational broadcasting will not be used by a provincial government for political purposes. This sort of authority will be set up in Ontario as a result of the probable enactment of Bill 43 entitled the Ontario Educational Communications Authority Act introduced in the Legislature by the Minister of Education Mr. Davis, March 19, 1970 (see Appendix II). And of course the government of Quebec has established the Quebec Broadcasting Bureau, although it is not independent of the provincial government in respect of its powers to erect or acquire broadcasting stations (powers which in themselves come dangerously close to conflicting with federal jurisdiction in the absence of a federal licence).

The new federal policy position might have been more specific in defining the sort of independent body it envisaged as a "provincial authority". However, it well might have been that some provincial governments insisted during negotiations on preserving a right to name whomever they pleased as the designated "provincial authority", and on their own terms, thus causing the federal government to take a more restrictive and paternalistic approach in respect of the licensing requirement, as the price for this right. Or it might have been that the federal government was concerned about section 23 of the Quebec Broadcasting Bureau Act⁹⁰ insofar as it purported to give the Bureau the right (subject to Cabinet approval) to erect or acquire stations for radio or wire broadcasting in Quebec, without acknowledging the licensing authority of the federal government by virtue of its constitutional jurisdiction in the field of broadcasting. These seem to be the only logical reasons why Ottawa has refused to allow the CRTC to license provincial authorities directly but has insisted that all licences for educational broadcasting granted by the CRTC be held by the CBC "as agent for the federal government pursuant to section 39(2) of the Broadcasting Act". Of course, it would be somewhat less than candid to ignore the federal government's concern with the government of Quebec's statements and initiatives in the field of broadcasting and the hard line that province took in the press on the "definition" issue when Bill C-179 was still alive. And the Government of Quebec did not even bother to send representatives to the hearings held by the Standing Committee. Apparently, agreement on the broader definition subsequent to Bill C-179 was achieved only by the federal government retaining a tighter control on the broadcasting framework through the requirement that all licences be held by the CBC as its agent, and not by the designated provincial authorities or an independent Canadian Educational Broadcasting Agency as envisaged by Bill C-179. This arrangement will make it much easier for the federal government to "police the definition" to ensure that provincial educational broadcasting activities do not conflict with general broadcasting regulated by the federal government, or jeopardize such legitimate federal areas of activity as immigration, national economic policy, or national security. Whether this sort of protection of federal interests is necessary or not is a matter which is really part of a much larger question in Canadian federalism today. Perhaps the new Bourassa government elected in Quebec on April 29, 1970 will prove to be somewhat less militant in attempting to define educational broadcasting in such a way as to subsume many aspects of general broadcasting, thus allowing Ottawa to loosen up on the licensing question.

Ontario and Alberta have already proceeded under the new federal

policy, in the short run at least, and are unlikely to experience any interference with their educational broadcasting programs, either by the CBC as licence holder or by the CRTC as licensor. Whether other provinces including Quebec will proceed under this new arrangement depends both on the availability of financial resources in these provinces and on the extent to which the provincial governments (or their designated "authorities") can live with the CBC implicitly exercising a policing and supervising function as licence holder.

It is to be hoped that in the long run all provinces will have sufficient financial resources to pay for the capital cost of ETV facilities. Any federal policy that perpetuates and even promotes an educational and cultural imbalance between the provinces has no place in Canada today. And it is to be hoped that all provincial governments will see fit to commit themselves to the establishment of independent provincial authorities for the regulation of ETV in their jurisdiction, and that the mutual trust and goodwill built up between the provincial and federal governments in this field will eventually permit the direct licensing of provincial authorities by the CRTC, and thus obviate the extra supervision in the present arrangement.

In the meantime, one must not forget that progress has finally been made. In 1970, more than three million Canadians potentially will have direct access to provincial educational broadcasting through Channel 19 in Toronto and Channel 11 in Edmonton. Quite rightly, the federal government could not have directed the CRTC to approve Ontario and Alberta licence applications for educational broadcasting under the new definition without having allowed the same privilege to the Quebec Broadcasting Bureau or any other provincial government department or authority. So instead it interposed the CBC as its agent to achieve basically the same result. Close consultation between the provincial and federal governments produced the broader definition under the federal policy of tighter supervision by the CBC. As a short-term proposition, this is perhaps the best that could be achieved. It is an example of the benefits of consultative federalism. It also might be considered as an example of the respect which the CRTC in its formative years seems to have gained for both levels of government and the Canadian people in objectively and effectively carrying out its mandate under the new Broadcasting Act of 1968. And most important, educational broadcasting will now be a reality rather than a dream for a great many Canadians.

As a long-term proposition, however, the new definition must be accompanied by more equitable financial arrangements for the provincial governments and direct licensing of provincial authorities. Otherwise many of the provincial governments will be impaired as a practical

matter in meeting the educational needs of their residents, in terms of both sufficiency of financial resources and educational flexibility. Yet until the federal government can become convinced that the Quebec government does not intend to use educational broadcasting as an instrument of political power in the federal-provincial context or as a means of invading the field of general broadcasting, then federal paternalism over licensing can be expected to continue.

Constitutional Recommendations in the Field of Broadcasting

Educational Broadcasting

The Problem of Definition

The most fundamental recommendation is that the provinces should maintain absolute control over all program content in educational broadcasting. The extent of this control will depend, to a large extent, on the definitions of "educational broadcasting" and of "programs for educational broadcasting" which are eventually arrived at in federal-provincial discussions.

For the moment, the definition agreed on by the Secretary of State and the Council of Ministers of Education (see p. 227, *supra*) would appear to be well suited to this objective, for reasons stated earlier.

The Problem of Cost

Since education is an exclusive provincial responsibility, and since it has been recommended that this responsibility include absolute control over program content in educational broadcasting, it follows logically that the provinces should pay all production costs for these programs. No one has disputed this. Where the difficulty lies is in which level of government should pay the capital costs of new transmission or cable facilities. On the one hand, it might be considered proper for the federal government to make a substantial contribution since it is the federal government which controls the technical aspects of broadcasting and which purportedly has the primary jurisdiction to dispense broadcasting licences. On the other hand, it might be argued that the federal government has no obligation, since it is the provincial governments which are requesting the new facilities for their educational programs and since federal contributions to capital costs to be applied according to federal conditions might be regarded as determining provincial priorities in the field of education in a manner unacceptable to some provincial governments.

Yet if one accepts the latter proposition, the less wealthy provinces are going to have to wait a long time before they have sufficient financial resources on their own to have an ETV system on the same scale as the ones in Ontario and Alberta.

Perhaps this is a matter that will have to be considered in the broader context of the current review of the taxing and spending powers under the Constitution. However, it is recommended that any long-term federal-provincial arrangement for the provision of transmission facilities for educational broadcasting take into account the financial disparities between the various provincial governments, but in a manner which does not externally impose priorities on any provincial government in the field of education.

The Problem of Control

Many of the arguments before the Standing Committee on Broadcasting, Films and Assistance to the Arts on the problem of definition considered the possibility of federal control or suppression of provincial educational programming in situations involving activities jeopardizing the continued existence of the Canadian federation. During the hearings of the Standing Committee, the following example was raised on a number of occasions: What would happen if a provincial broadcasting authority ran a series of educational programs advocating the political separation of that province from the Canadian federation? At what point would the federal government intervene to "pull the switch" under its authority over broadcasting and national security?

It is submitted that this approach, as a method of testing the outer reaches of any long term federal-provincial arrangement for educational broadcasting, is not particularly helpful. If a province wanted to jeopardize the continued existence of the federation through the deliberate abuse of its authority in the field of educational broadcasting, the "pulling of the switch" by the federal authorities (the CBC under the present arrangement) would only aid the errant province in such activity, in the long run. And the organized activities of the secessionists would not be confined, in all probability, to the field of educational broadcasting. In any event, if that situation were to occur, no federal-provincial arrangement, no matter how carefully drafted, would hold the federation together. Legislative and constitutional definitions are useful in ordering relationships between governments only insofar as they clearly express the real and long-run expectations of the representative bodies which enact them.

⁹⁰ *Supra*, note 61.

In short, it is recommended that the federal government move in the direction of a policy under which it would request the CRTC on application to grant educational broadcasting licences directly to provincial authorities, upon being satisfied as to the independence of such authorities from political interference. The requirement that the CBC act as licence holder for a provincial authority should eventually be phased out, unless a provincial authority requested such an arrangement. And each provincial government, in addition to providing for the independence of its educational broadcasting authority, should set forth legislative guidelines to ensure that the authority's programs stay within the agreed definition.

Finally it should be pointed out that if the CRTC were to license provincial authorities directly, a considerable measure of federal control would still remain by virtue of the power of the Governor in Council to set aside or refer back to the CRTC any broadcasting licence under section 23 of the Broadcasting Act,⁹¹ or alternatively, by the power of the CRTC itself to revoke or suspend a licence under section 24.

As for the present arrangement under which the CBC is required as agent of the federal government to act as licence holder for educational broadcasting stations programmed by provincial authorities, this extra federal control seems all the more incongruous in the light of the fact that it is the provincial governments which will be paying for all the capital costs of transmission facilities in the long run if the federal government adheres to its policy of having the CBC provide such facilities only on a recoverable cost basis.

Diversification of Media

The new policy of the federal government announced on November 5, 1969 contemplates the creation of provincial ETV authorities to work in cooperation with the CBC, as holder of broadcasting licences from the CRTC, and with the holders of cable licences who will now be required to set aside at least one channel for educational programming. The medium to be used in this cooperative arrangement will be the UHF and (to a lesser extent) the VHF bands, as well as cable, at least until terrestrial or satellite telecommunication systems become available. There are other media of broadcasting, however, which Ontario might utilize, although admittedly they are not as universally accessible as UHF, VHF or cable. For example, the 2500 Megahertz system has many possibilities in large

⁹¹ Stats. Can. 1967-1968, c. 25.

urban areas, even though its use is somewhat limited geographically. The provincial educational broadcasting authority would merely have to obtain a technical licence from the DOT for this particular type of endeavour.

Also, videotapes prepared in advance offer a great scope for closed circuit in-school situations where programs can be easily worked into existing curricula.

Provincial distribution of programs by coaxial cable offers perhaps the greatest possibility in the long run. There are a number of privately owned cable systems already in operation throughout the province. A provincial authority could either buy out various companies or rent time on the private systems (which now must have one channel set aside), although in the former case the CRTC might oppose a provincial authority as assignee of a cable licence for the same reasons as it is directed by the federal government to deny broadcasting licences to provincial authorities. And it has never been conclusively determined whether the CRTC has any authority at all over a closed circuit cable system within a province that does not draw on the air waves through an antenna or otherwise but merely feeds live material from the camera or videotape directly into the cable. It is believed that Radio-Québec is proceeding with an elaborate cable system of this sort without any federal sanction from the CRTC or DOT.

And of course, a provincial authority could continue to buy time from existing CBC stations or private network stations, especially in the "down-time" morning hours.

Finally, there is still much scope for the further use of conventional films, produced privately or by a provincial educational authority.

In short, a diversified approach is recommended which would utilize all existing and future technology, keeping in mind the primary factors of cost, accessibility and relevance.

Coupled with this diversified approach, however, the provinces must press forward in the fields of UHF and VHF broadcasting. Other media, such as films, videotape, and the 2500 Megahertz system are limited to the extent that they are capable of contributing little to the educational needs of pre-school children and adults who must receive educational programs in their homes. In addition, UHF and VHF broadcasting is still the cheapest method of getting educational programs into the classrooms, an important factor to be considered in the pursuit of the goal of universal accessibility. And, of course, one must not forget the educational benefits of immediacy and relevance often made possible only through UHF or VHF coverage.

Constitutional Reform

In the context of the present intergovernmental discussions concerning a new or amended Constitution for Canada, Ontario, together with the other provinces, should assert an exclusive provincial interest in a separate field of constitutional jurisdiction called "educational broadcasting". This mode of instructional communication has now been developed to the point where it should be considered as an essential instrument of any provincial government which intends to fulfil its established constitutional mandate in the field of education. To this end, it should be elevated to the status of a separate constitutional head, or at least be included as part of section 93 of the British North America Act.

The technical aspects of broadcasting, now administered by the DOT and, to a lesser extent, by the CRTC, should remain the exclusive legislative jurisdiction of the federal government under a new head "Radiocommunication". In this way, technical overlapping and conflict can be avoided through the single regulatory process, while at the same time giving the utmost freedom and flexibility to the provinces in fulfilling their constitutional responsibilities.

The matter of "general broadcasting" should be characterized as an exclusive federal power separate and apart from "educational broadcasting". It will be considered in the remaining pages of this section. Suffice it to say here that the distinction between educational broadcasting and general broadcasting would be one to be worked out between the provinces and the federal government in the same way as the definition of "programs for educational broadcasting" has been worked out, subject of course to supervision of the courts through judicial interpretation in the event of a dispute.

Under the above proposals applied to educational broadcasting in the provinces, the DOT would still play its traditional role in respect of the technical regulation of the air waves. And the CRTC, or a similar federal agency, would still play a vital licensing role both in respect of the allocation of frequencies under the exclusive federal jurisdiction "radio-communication" and in respect of determining whether applicants for such frequencies are capable of or intend to come within the accepted definition of "programs for educational broadcasting" agreed to in intergovernmental consultations. But as for programming and financing of educational broadcasting, the exclusive jurisdiction and responsibility would lie with the provinces who would, in the normal course of things, have their ETV authority apply for licensing directly from the CRTC. As for future changes in the definition, a formula requiring agreement between the federal government and seven out of ten provinces representing at least 60 per cent of the population of Canada might be an

acceptable way of proceeding in the absence of a court interpretation as to the extent of provincial power under the head "educational broadcasting".

Practically speaking, there would be few changes from present policies under these proposals. While the federal government might have some difficulty justifying the continued denial of direct CRTC licensing of provincial authorities, some measure of federal control would still exist through the DOT and CRTC. Any province that wanted to set up its own stations or cable system for educational broadcasting (including Quebec under section 23 of the Quebec Broadcasting Bureau Act) would still have to go through both federal agencies and be subject to their reasonable requirements to ensure compliance with technical feasibility and jurisdictional limitations. The only exceptions would be closed circuit videotape systems and cable systems that did not use the air waves or were not connected in any way with a transmitter or receiver using the air waves so as to come within the term "radiocommunication" (see section 3(i) of the Broadcasting Act). These latter systems appear to be free from any federal regulation even under present arrangements.

Of course, some provinces might still prefer to have all educational broadcasting services in their jurisdiction provided by the CBC or other federally regulated private broadcasters on a contract basis. The assignment of "educational broadcasting" to the provinces as a head of exclusive jurisdiction would not prevent such arrangements. If necessary, a provincial government could delegate all or a portion of its jurisdiction over educational broadcasting to the CBC or other federal agency. There would appear to be judicial precedent supporting the validity of such a transfer of power.⁹²

But as the UHF band becomes opened up and as other broadcasting media become available through the development of new technology, the field of education will begin to encompass and utilize broadcasting as a means of instruction to a far greater extent than ever before. The adoption of these constitutional proposals would go at least part way towards reducing the intensity of disputes between the federal government and the provinces, while at the same time preserving to the federal government the right to regulate the air waves and promote the national political and cultural interests inherent in a general broadcasting system, and also preserving to the provinces within their jurisdiction the exclusive right to control education in all of its aspects.

An alternative proposal for constitutional amendment in this field might be the designation of "broadcasting" as a concurrent power in the

⁹² *P.E.I. Potato Marketing Board v. H. B. Willis Inc. and A.-G. Can.*, [1952] S.C.R. 392; *Coughlin v. Ontario Highway Transport Board* (1968), 68 D.L.R. (2d) 384 (S.C.C.).

federal and provincial governments with paramountcy to the federal government in the event of a conflict, and with an exclusive federal jurisdiction in the field of "radiocommunication". While this proposal might leave the two levels of government with the utmost in flexibility with which to work out acceptable arrangements for educational broadcasting, it would open the door to any province, particularly Quebec, that wanted to create a general broadcasting system of its own to operate parallel with the national system. The difficulties in proving a conflict with the national system so as to allow the federal system to assert paramount powers would be almost insurmountable. And in any event, there are other good reasons, discussed in the next section, for maintaining exclusive federal jurisdiction in the field of general broadcasting. It is recommended, therefore, that a proposal such as this not be pursued.

Perhaps a more acceptable alternative would be to leave the existing constitutional provisions as they now stand with the provincial government having exclusive jurisdiction over "education" (with the exception of the denominational school provisions) and the federal government having exclusive jurisdiction over "radiocommunication" (by virtue of the *Radio* case),⁹³ with the field of "broadcasting" (including general programming) appearing to be a matter of federal jurisdiction as a result of governmental practice and the general thrust of the *Radio* case although never clearly determined as an *exclusive* federal jurisdiction. The difficulties with the present situation are two-fold: not only is there an absence of any guarantee that the provinces will have absolute control over program content in educational broadcasting but, cutting the other way, there is no guarantee that a province will not assert a "cultural" jurisdiction in the field of general broadcasting (as distinct from "radiocommunication") within its geographical boundaries and be upheld by the courts as long as federal "radiocommunication" requirements are met. While one may be tempted to predict that the judicial response in Canada might be against such an assertion in the light of the *Radio* case, the provincial argument would have the support of the Aird Commission⁹⁴ of 1929 as well as the fact of the existence of general broadcasting legislation in Quebec since 1945.

In short, while it is recognized that the existing constitutional provisions are not entirely unworkable in respect of educational broadcasting, it is recommended that to preserve and protect the vital interest of both Parliament and the provincial Legislatures, "educational broadcasting"

⁹³ [1932] A.C. 304.

⁹⁴ Canada, *Report of the Royal Commission on Radio Broadcasting* (Sir John Aird, Chairman), King's Printer, Ottawa, 1929.

be included in the heads of provincial powers and "general broadcasting" be included in the heads of federal powers.

General Broadcasting

The new Broadcasting Act,⁹⁵ like its predecessors, virtually ignores any direct involvement of the provinces in the field of general broadcasting or program content. This position is made emphatically clear in that part of section 2 following a general statement of broadcasting policy for Canada:

2. It is hereby declared that
... the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

The Act then goes on to create the "independent public authority" in the form of the Canadian Radio-Television Commission, which is to consist of five full-time members and ten part-time members to be appointed by the Governor in Council. As with the predecessor Board of Broadcast Governors (BBG) and its predecessor (prior to 1958) the Canadian Broadcasting Corporation, there is no provision for appointment to the CRTC of provincial representatives. Nor is there even a provision for "geographical representation", as in the case of the pre-1958 Canadian Broadcasting Corporation. Thus the provinces are again denied any form of direct involvement in general broadcasting.

This last observation is not to suggest, however, that the federal government should necessarily revise its new legislation to provide for direct provincial control over all programming, as envisaged by the 1929 Aird Commission. Nor should Ontario seek such a revision. To do so would be to turn back the clock on thirty-six years of federal experience in the regulation of general broadcasting; it would also disrupt the ordered expectations of hundreds of private broadcasters and CBC affiliates who have committed substantial efforts and resources to general broadcasting on the understanding of a single national broadcasting policy being pursued exclusively by the federal government. Much of what is good in Canadian general broadcasting might well be jeopardized if the provinces were suddenly to be given full control over the programs of the stations in their respective areas. Aside from political considerations, which are not of little moment, the sheer impracticality of such a proposal because of the scarcity of general broadcasting technology and expertise in many of the provinces, as compared with the federal

⁹⁵ *Supra*, note 91.

agencies, strongly militates against it. In addition, if general broadcasting is to be used as a vehicle of 1) safeguarding, enriching and strengthening the cultural political, social, and economic fabric of Canada; 2) serving (in English and French) the special needs of geographic regions, and actively contributing (in English and French) to the flow and exchange of cultural and regional information and entertainment; and 3) contributing to the development of national unity and providing for a continuing expression of Canadian identity (specific goals in the stated broadcasting policy for Canada in the new Broadcasting Act) — then surely provincial control over general programs would be inconsistent with the most effective pursuit of these goals through a single regulatory agency.

In the context of the present intergovernmental discussions concerning a new or amended Constitution for Canada, Ontario should be content to allow general broadcasting to be characterized as a field of exclusive federal jurisdiction, as long as the corresponding field of "educational broadcasting" is made a separate head of exclusive provincial jurisdiction, or at least included under a revised section 93 of the British North America Act. The role of general broadcasting in the strengthening of Canadian society and the development of national unity is an overriding consideration in this respect, notwithstanding the existence of a provincial "interest" in the educational and cultural aspects of the activity.

None of the provinces, with the exception of Quebec, has indicated any strong desire to enter the general broadcasting field. The primary provincial concern has been with educational broadcasting, and even there only with program content. As long as the provinces are given exclusive jurisdiction in this latter field, and are able to satisfy the educational and cultural needs of their residents within the negotiated methodological framework of "educational programs" discussed earlier, then there can be no viable argument that the provinces are unnecessarily stifled in the pursuit of their constitutional responsibilities. On the other hand, the direct entry of a province into the field of general broadcasting by the characterization of that head as concurrent in both levels of government would be to invite regulatory conflict, unnecessary duplication of facilities, and provincial broadcasting policies inconsistent with national unity and a strong Canadian society.

Appendix I

1st Session, 28th Parliament, 17-18 Elizabeth II, 1968-69

THE HOUSE OF COMMONS OF CANADA

BILL C-179

(First Reading, March 10, 1969)

(Withdrawn, November 5, 1969)

An Act to establish the Canadian Educational Broadcasting Agency and to make certain consequential amendments to the Broadcasting Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

CANADIAN EDUCATIONAL BROADCASTING AGENCY

Interpretation

Definitions.

1. In this Part,

(a) "Agency" means the Canadian Educational Broadcasting Agency established by section 2;

(b) "director" means a director of the Agency;

(c) "educational broadcasting" means the broadcasting of educational programs;

(d) "educational programs" means programs that are designed to be presented in a structured context to provide a continuity of learning content aimed at the systematic acquisition or improvement of knowledge by members of the audience to whom such programs are directed, and under circumstances such that the acquisition or improvement of such knowledge is subject to supervision by any appropriate means, including

(i) the registration or enrolment of members of such audience in a

course of instruction that includes the presentation of such programs,

(ii) the granting to members of such audience of credit towards the attainment of a particular educational level or degree, or

(iii) the examination of members of such audience on the content of such programs or on material of which that content forms a part,

and "educational program material" has a corresponding meaning;

(e) "Minister" means the Secretary of State of Canada;

(f) "president" means the president of the Agency; and

(g) "provincial authority" in relation to any province means such person, body or authority as may be designated by the Lieutenant Governor in Council of that province as the provincial authority for that province for the purposes of this Part.

Corporation Established

Corporation established.

2. (1) There shall be a corporation, to be known as the Canadian Educational Broadcasting Agency, consisting of a president and six other directors to be appointed by the Governor in Council to hold office during pleasure, two of whom shall be selected from the public service of Canada.

Tenure of office.

(2) The president shall be appointed to hold office for a term not exceeding five years, and the other directors shall each be appointed to hold office for a term not exceeding three years.

Reappointment.

(3) Subject to subsection (4) and section 3, the president is eligible for reappointment upon the expiration of his term of office, but any other director who has served two consecutive terms is not, during the twelve months following the completion of his second term, eligible for appointment except as president.

Termination at age 65.

(4) A director ceases to be a director of the Agency upon attaining the age of sixty-five years.

Oath of office.

(5) Every director shall, before entering upon his duties as such, take and subscribe, before the Clerk of the Privy Council, an oath in the following form:

I DO SOLEMNLY SWEAR that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of

and that while I continue to hold such office, I will not, as owner, shareholder, director, officer, partner or otherwise, have any pecuniary or proprietary interest in the production or distribution of educational program material suitable for broadcasting by the Canadian Educational Broadcasting Agency or in the manufacture or distribution of radio apparatus except where such distribution is incidental to the general merchandising of goods by wholesale or by retail.

Outside interests.

3. (1) A person is not eligible to be appointed or to continue as a director of the Agency if he is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise he has any pecuniary or proprietary interest in the production or distribution of educational program material suitable for broadcasting by the Agency or in the manufacture or distribution of radio apparatus except where such distribution is incidental to the general merchandising of goods by wholesale or by retail.

Disposing of interest.

(2) Where any interest prohibited under subsection (1) vests in a director by will or succession for his own benefit, he shall, within three months thereafter, absolutely dispose of such interest.

. . .

Objects, Powers and Duties

Objects.

7. (1) The objects of the Agency are to facilitate educational broadcasting in Canada, and the extension of educational broadcasting to all parts of Canada as the need arises and as funds become available to the Agency for such purpose, by providing and operating facilities for the broadcasting of educational programs on behalf of provincial authorities and, subject to subsection (2), educational organizations and institutions in Canada.

Priority in use of facilities.

(2) Subject to subsection (2) of section 18 of the *Broadcasting Act*, the Agency shall give priority in the use of the facilities provided and operated by it to the broadcasting of educational programs on behalf of provincial authorities, and in order to ensure such priority, no agreement providing for the broadcasting by the Agency of educational programs shall be entered into between the Agency and any educational organization or institution without the approval of the provincial authority of the province in which the broadcast would originate, and any agreement entered into in contravention of this subsection is of no force or effect.

Powers.

8. (1) In order to carry out its objects, the Agency may, subject to any applicable regulations of the Canadian Radio-Television Commission,

(a) in accordance with the conditions of any licence or licences issued to it by the Canadian Radio-Television Commission, establish, equip,

maintain and operate broadcasting undertakings for the broadcasting of educational programs, and acquire by purchase, lease or otherwise any such undertakings;

(b) enter into agreements with provincial authorities and with educational organizations and institutions in Canada relating to educational broadcasting and providing for the broadcasting by the Agency of educational programs on behalf of such authorities, organizations and institutions;

(c) subject to and in accordance with any agreement in that behalf that may be entered into between the Agency and any provincial authority,

(i) procure the production, within or outside Canada and either under a co-production agreement with any other person or body or otherwise, of educational program material for use in educational broadcasting,

(ii) secure educational program material from within or outside Canada by purchase, exchange or otherwise, and (iii) distribute or cause to be distributed within or outside Canada any educational program material for use in educational broadcasting; and

(d) do all such other things as are necessary or incidental to the attainment of its objects.

Use of existing facilities.

(2) In carrying out its objects, the Agency shall, wherever appropriate, utilize such of the facilities of the Canadian Broadcasting Corporation and the National Film Board as may, consistent with the proper carrying out of the objects of the Canadian Broadcasting Corporation and the National Film Board, be made available by them to the Agency, and, for that purpose, the Agency and the Canadian Broadcasting Corporation or the National Film Board may enter into contracts, leases or other arrangements relating to the use of such facilities.

Application of Broadcasting Act.

(3) The Agency is bound by the provisions of Parts I and II of the *Broadcasting Act*.

Nature and location of facilities.

9. In planning for the expenditure of funds allocated by it for the provision of facilities for the broadcasting of educational programs within any province, the Agency shall, to the greatest extent possible consistent with the carrying out by the Agency of its objects, be governed by the advice of the provincial authority of the province as to the nature

of the educational broadcasting facilities that are required and as to the locations within the province in which such facilities are most urgently required.

No agreement without approval.

10. (1) No agreement between the Agency and a provincial authority, other than an agreement of a class prescribed by regulations made by the Governor in Council, shall be entered into by the Agency without the approval of the Governor in Council, and any such agreement entered into in contravention of this subsection is of no force or effect.

Regulations.

(2) The Governor in Council may make regulations prescribing classes of agreements between the Agency and provincial authorities in respect of which approval by the Governor in Council is not required.

Lease of facilities.

11. Where the Agency is unable to contract with provincial authorities and educational organizations and institutions for the full utilization of the facilities of any broadcasting undertaking of the Agency for educational broadcasting, the Agency may, subject to the *Radio Act* and any regulations made thereunder and to any applicable regulations of the Canadian Radio-Television Commission, lease all or any of the facilities of the broadcasting undertaking that are not being fully utilized for educational broadcasting, for such time only as they are not being so utilized.

Limitation on power to broadcast.

12. Subject to subsection (2) of section 18 of the *Broadcasting Act*, no programs shall be broadcast by the Agency except educational programs broadcast on behalf of a provincial authority or an educational organization or institution in Canada.

Agent of Her Majesty

Agent of Her Majesty.

13. (1) The Agency is, for all purposes, an agent of Her Majesty, and its powers may be exercised only as an agent of Her Majesty.

Contracts.

(2) The Agency may, on behalf of Her Majesty, enter into contracts in the name of Her Majesty or in the name of the Agency.

Property.

(3) Property acquired by the Agency is the property of Her Majesty and title thereto may be vested in the name of Her Majesty or in the name of the Agency.

Proceedings.

(4) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Agency on behalf of Her Majesty, whether in its name or in the name of Her Majesty, may, subject to subsection (3) of section 14, be brought or taken by or against the Agency in the name of the Agency in any court that would have jurisdiction if the Agency were not an agent of Her Majesty.

Expropriation.

14. (1) The Agency may, with the approval of the Governor in Council, take or acquire lands without the consent of the owner for the purpose of carrying out its objects, and, except as otherwise provided in this section, all the provisions of the *Expropriation Act*, with such modifications as circumstances require, are applicable to and in respect of the exercise of the powers conferred by this section and the lands so taken or acquired.

Plan and description.

(2) For the purposes of section 9 of the *Expropriation Act*, the plan and description may be signed by the president or any two other directors of the Agency.

Compensation.

(3) The compensation for lands taken or acquired under this section, or for damage to lands injuriously affected by the construction of any work by the Agency, shall be paid by the Agency as though the lands were acquired under the other provisions of this Part, and all claims against the Agency for such compensation or damages shall be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the *Exchequer Court Act*; but nothing in this subsection shall be construed to affect the operation of section 34 of the *Expropriation Act*.

Head Office and Meetings

Head office.

15. (1) The head office of the Agency shall be in the National Capital Region described in the Schedule to the *National Capital Act*

or at such other place in Canada as the Governor in Council may prescribe.

Meetings.

- (2) The Agency shall meet at least six times in each year.

By-Laws

By-laws.

16. (1) The Agency may make by-laws,
(a) for the regulation of its proceedings, including the establishment of special and standing committees of the Agency consisting of directors of the Agency or of directors of the Agency and persons other than such directors, the delegation to such committees of any of its duties and the fixing of quorums for meetings of such committees,
(b) fixing the fees to be paid to directors appointed from outside the public service of Canada, other than the president, for attendances at meetings of the Agency or any committee thereof, and the travelling and other expenses to be paid to directors,
(c) respecting the duties and conduct of the directors, officers and employees of the Agency, and
(d) generally for the conduct and management of the affairs of the Agency,

but no by-law made under paragraph (b) shall have any effect unless it has been approved by the Minister.

Special advisory committee.

- (2) The Agency may by by-law provide for the establishment of a special committee of the Agency, consisting of directors or officers of the Agency and representatives of provincial authorities, to advise the Agency on matters that are of common concern or interest to the provincial authorities represented on the committee or to any two or more of such authorities, relating to educational programs or the production, securing or distribution of educational program material for use in educational broadcasting.

General

Application of certain Acts and regulations.

17. (1) The Agency shall be deemed, for the purposes of the *Crown Corporations (Provincial Taxes and Fees) Act*, to be listed in the Schedule to that Act.

Payments in lieu of land taxes.

(2) The Agency may make grants in lieu of taxes to any municipality in Canada in amounts not exceeding the taxes that might be levied by that municipality in respect of real property under the control, management or administration of the Agency if the Agency were not an agent of Her Majesty.

Idem.

(3) For the purposes of any regulations made pursuant to section 5 of the *Aeronautics Act*, the officers and employees of the Agency shall be deemed to be employees in the public service of Canada.

Financial Provisions

Educational Broadcasting Account.

18. There shall be established in the Consolidated Revenue Fund a special account to be known as the Educational Broadcasting Account to which shall be charged

- (a) all expenditures of the Agency made under the authority of this Part,
- (b) all repayments of amounts advanced to the Agency under section 19, and
- (c) all payments of interest on amounts advanced to the Agency under section 19,

and to which shall be credited

- (d) all revenue from the operations of the Agency,
- (e) any amounts advanced to the Agency under section 19, and
- (f) any amounts from time to time appropriated by Parliament for the purposes of the Agency.

Advances.

19. (1) The Governor in Council may authorize the Minister of Finance, on behalf of Her Majesty, to make advances to the Agency on such terms and conditions as may be agreed upon.

Idem.

(2) The total amount outstanding at any time of advances made under subsection (1) shall not exceed fifty million dollars.

Audit.

20. The accounts and financial transactions of the Agency shall be audited annually by the Auditor General and a report of the audit shall be made to the Minister and to the Agency.

Report to Parliament

Annual report.

21. The Agency shall, within three months after the termination of its financial year, submit to the Minister a report, in such form as the Minister may direct, on the operations of the Agency for that financial year, and the Minister shall cause the report to be laid before Parliament within fifteen days after the receipt thereof, or if Parliament is not then sitting, on any of the first five days next thereafter that Parliament is sitting.

. . .

GENERAL

This Act to be consolidated with Broadcasting Act.

28. The Statute Revision Commission established under *An Act respecting the Revised Statutes of Canada* shall, in consolidating and revising the public general statutes pursuant to that Act, consolidate this Act as a Part of the *Broadcasting Act*; and the Statute Revision Commission may, without altering the substance of this Act and the *Broadcasting Act*, make such alterations in their form and language as are necessary for the purposes of this section.

Coming into force.

29. This Act shall come into force on a day to be fixed by proclamation.

Appendix II

3RD SESSION, 28TH LEGISLATURE, ONTARIO

19 ELIZABETH II, 1970

BILL 43

1970

(First Reading, March 19, 1970)

An Act to establish

The Ontario Educational Communications
Authority

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation.

1. In this Act,

- (a) "Authority" means The Ontario Educational Communications Authority;
- (b) "Board" means the board of directors of the Authority;
- (c) "Minister" means the Minister of Education.

Authority established.

2. (1) There is hereby established a corporation without share capital under the name "The Ontario Educational Communications Authority", consisting of thirteen members, one of whom shall be the Chairman, and of the remaining twelve members, not fewer than three and not more than four shall be members of the public service of Ontario.

Appointment of members.

(2) The members of the Authority, including the Chairman, shall be appointed by the Lieutenant Governor in Council to hold office for not more than three years but may be reappointed by the Lieutenant Governor in Council, and at least three members shall retire each year.

Board of directors.

(3) The members for the time being of the Authority form and are its board of directors.

Chairman and Vice-Chairman of the Board.

(4) The Chairman of the Authority shall be the Chairman of the Board, and the Lieutenant Governor in Council may from time to time designate one of the other members as Vice-Chairman of the Board and prescribe his duties.

Fees and expenses.

(5) A director, other than the Chairman, may be paid such fees for attendance at meetings of the Authority as may be fixed by the Lieutenant Governor in Council, and all directors are entitled to be paid their actual travelling and living expenses necessarily incurred on the business of the Authority.

Quorum.

(6) Six directors constitute a quorum for meetings of the Board.

Meetings.

(7) Meetings of the Board or of the members of the Authority shall be held at the call of the Chairman, or in the absence or incapacity of the Chairman or if the office of Chairman is vacant, in such other manner as may be prescribed by the by-laws of the Authority, but in no case shall more than six months elapse between meetings of the Board.

Head Office.

(8) The head office of the Authority shall be at The Municipality of Metropolitan Toronto, or such other place in Ontario as the Lieutenant Governor in Council designates.

Fiscal year.

(9) The fiscal year of the Authority begins on the 1st day of April and ends on the 31st day of March in the following year.

Objects of Authority.

3. The objects of the Authority are,
 - (a) to initiate, acquire, produce, distribute, exhibit or otherwise deal in programs and materials in the educational broadcasting and communications fields;
 - (b) to engage in research in those fields of activity consistent with the objects of the Authority under clause a; and
 - (c) to discharge such other duties relating to educational broadcasting and communications as the Minister may direct, with the approval of the Lieutenant Governor in Council.

Acquisition of land.

4. Subject to the approval of the Lieutenant Governor in Council, the Authority may,

- (a) acquire by purchase, lease or otherwise; and
 - (b) sell or otherwise dispose of,
- any land or any interest in land.

By-laws, making.

5. (1) Subject to subsections 2 and 3, the Board may make by-laws regulating its proceedings and generally for the conduct and management of the affairs of the Authority.

Filing.

(2) All by-laws of the Authority shall be filed with the Minister provided, however, that no by-law shall take effect until the expiration of two weeks from the date of filing.

Amendment.

(3) The Lieutenant Governor in Council may amend or revoke any by-law provided that any such amendment or revocation shall not prejudice the rights of any person dealing with the Authority.

Chief executive officer.

6. (1) The Chairman is the chief executive officer of the Authority and shall be paid such salary as the Lieutenant Governor in Council determines.

Staff.

(2) The Board may employ such persons and retain such technical and professional consultants as it considers necessary for the conduct of the affairs of the Authority at such remuneration and upon such terms as the Board approves.

Application of R.S.O. 1960, c. 202.

(3) The officers and employees of the Authority are not Crown employees, and the provisions of *The Labour Relations Act* apply to them and to the Authority.

Powers of Authority.

7. (1) The Authority has the following powers incidental and ancillary to its objects,

- (a) to enter into operating agreements with the appropriate agency or agencies of the Government of Canada and with broadcasting stations or networks for the broadcasting of educational programs;
- (b) to enter into contracts with any person in connection with the production, presentation or distribution of the programs and materials of the Authority;
- (c) to acquire, publish, distribute and preserve, whether for a consideration or otherwise, such audio-visual materials,

papers, periodicals and other literary matter as relate to any of the objects of the Authority;

- (d) to make arrangements or enter into agreements with any person for the use of any rights, privileges or concessions that the Authority may consider necessary for the purposes of carrying out its objects.

Application of R.S.O. 1960, c. 71.

(2) Except as provided in subsection 3, subsection 1 of section 22 of *The Corporations Act* applies to the Authority.

Idem.

(3) Clauses *a, b, d, e, g, h, j, k, m, p, q, r, t, u* and *v* of subsection 1 of section 22, and sections 287 and 288 of *The Corporations Act* do not apply without the approval of the Lieutenant Governor in Council.

Employee benefits.

8. The Authority may provide compensation for services performed by way of remuneration and employee benefits which the Authority may from time to time consider appropriate, to or for the benefit of any of the persons mentioned in section 6, or any class or classes of them, as well as any other persons who may be entitled thereunder, out of a fund or funds comprising contributions made by such persons, or any class or classes thereof, or by the Authority, or both or otherwise.

Advisory committees.

9. The Authority may appoint such advisory committees as it considers necessary to advise it in developing the policy and operations of the Authority, and may pay the members thereof such fees for attending meetings as may be fixed by the Treasury Board of Ontario and such members are entitled to be paid their actual travelling and living expenses necessarily incurred on the business of a committee.

Bank accounts.

10. (1) The Authority shall maintain in its own name one or more accounts in The Province of Ontario Savings Office or in one or more chartered banks or in one or more trust companies registered under *The Loan and Trust Corporations Act*.

R.S.O. 1960, c. 222.

Deposits in trust company.

(2) The total deposits of the Authority in any trust company shall not exceed at any one time 3 per cent of the paid-in capital plus surplus and reserves of the trust company.

Moneys of Authority to be deposited in bank accounts.

(3) Subject to subsection 3 of section 15, all moneys received by the Authority through the conduct of its operations or otherwise shall be deposited to the credit of accounts established under subsection 1, and shall be administered by the Authority exclusively in carrying out its objects.

Audit.

11. The accounts and financial transactions of the Authority shall be audited annually by the Provincial Auditor or such other auditor or auditors as the Lieutenant Governor in Council may appoint, and a report of the audit shall be made to the Authority and to the Minister.

Annual report.

12. (1) The Board shall make an annual report to the Minister upon the affairs of the Authority, and the Minister shall submit the report to the Lieutenant Governor in Council and shall then lay the report before the Assembly if it is in session or, if not, at the next ensuing session.

Further reports.

(2) The Authority shall make such further reports to the Minister as the Minister may from time to time require.

Issue of securities.

13. (1) With the approval of the Lieutenant Governor in Council, the Authority may borrow money for purchasing or otherwise acquiring real or personal property, for making improvements, or for any of the objects of the Authority, and may issue bonds, debentures, notes or other securities to provide for the repayment of any money so borrowed, and such securities may be payable at such times and in such manner and at such place or places in Canada or elsewhere, and may bear such interest, as the Authority may consider proper.

Guaranteeing securities.

(2) The Lieutenant Governor in Council may authorize the Treasurer of Ontario and Minister of Economics for and on behalf of Ontario to guarantee the payment of any securities issued by the Authority for any of the purposes mentioned in subsection 1.

Form of guaranty.

(3) The form of guaranty and the manner of its execution shall be determined by the Lieutenant Governor in Council.

Purchase of securities by Province.

14. (1) The Lieutenant Governor in Council may authorize the Treasurer of Ontario and Minister of Economics,

(a) to purchase any securities of the Authority; and

(b) to make advances to the Authority in such amounts, at such times and on such terms and conditions as the Lieutenant Governor in Council may consider expedient.

Idem.

(2) The moneys required for the purposes of this section shall be paid out of the Consolidated Revenue Fund.

Cost.

15. (1) The cost of the establishment, maintenance and conduct of the Authority shall be payable until the 31st day of March, 1971, out of the Consolidated Revenue Fund and thereafter out of moneys appropriated therefor by the Legislature.

Application of revenue.

(2) All moneys received by the Authority shall be applied in the discharge of its duties and obligations.

Surplus money.

(3) Any surplus moneys shall, on the order of the Lieutenant Governor in Council, be paid into and form part of the Consolidated Revenue Fund.

Commencement.

16. This Act comes into force on a day to be named by the Lieutenant Governor by his proclamation.

Short title.

17. This Act may be cited as *The Ontario Educational Communications Authority Act, 1970*.

French-Language Public Secondary Schools in Ontario

Cultural and Educational Subcommittee

Introduction

In 1967 the members of the Cultural and Educational Subcommittee of the Ontario Advisory Committee on Confederation studied the problem of French-language public secondary schools in Ontario. In the course of their inquiries they became aware of the real progress the Province had made in developing educational facilities for its French-speaking residents.

On August 24, 1967 in his address to the Twentieth Annual Conference of the Canadian Association of French Language Educators in Ottawa, the Prime Minister of Ontario, the Honourable John Robarts, declared that his government would “. . . direct the Department of Education to proceed with the establishment of a committee whose terms of reference will be to advise the Government as to the procedures required to provide adequate opportunities in the public educational system for those who are primarily French-speaking”. Earlier in the same speech, the Prime Minister had stated more specifically the intention of his government to provide “within the public school system of Ontario, secondary schools in which the language of instruction is French”. These and related policies, he concluded, “will be put into effect as expeditiously as possible”.

The Subcommittee endorsed this constructive step towards the provision of equal educational opportunities for the French-speaking citizens of Ontario. This report presents the Subcommittee's views and conclusions on this issue.

Alexander Brady, Chairman; John Conway; Paul W. Fox; Reverend Lucien Matte, S.J.; John Meisel; Roger N. Séguin, Q.C.; T. H. B. Symons.

October 1967

Historical Background

The use of French as a language of instruction in Ontario dates from the early days of the French settlements. Before Confederation, particularly in the period of the Union of Upper and Lower Canada, French-language and English-language primary schools were established without much prior debate. The first official permission given by the Council of Public Instruction for teaching in a language other than English came in 1851.¹ The Council stated that persons who applied for teaching positions could substitute a knowledge of French or German grammar for English. The effect of this ruling was to sanction "the exclusive use of French [or German] in any of the schools of Upper Canada".² A letter, dated April 24, 1857, from Dr. Egerton Ryerson, Chief Superintendent of Education in Upper Canada, to the Trustees of School Number 3, in Charlottenburg, expressed the official attitude of the day towards French-language instruction:

I have the honour to state in reply to your letter of the 16th that as French is the recognized language of the country, as well as English, it is quite proper and lawful for the trustees to allow both languages to be taught in their school to children whose parents may desire them to learn both.³

In 1867, section 93 of the British North America Act placed education under the exclusive jurisdiction of the provinces. This section provided for denominational schools with no mention of language. The distinction between religion and language was not judicially determined until 1917 when, in *MacKell vs. the Ottawa Separate School Trustees*, the Judicial Committee of the Privy Council declared that section 93 referred to religion and not to language.⁴ Since Confederation did not alter the administrative arrangements for schools that had prevailed in the Province of Canada before 1867, no specific statutory provision was ever made in Ontario for the use in the schools of any language other than English.

¹ J. A. Hope, *Report of the Royal Commission on Education in Ontario, 1950*, King's Printer, Toronto, 1950, p. 394 (hereinafter cited as *Hope Commission*). See also C. B. Sissons, *Bilingual Schools in Canada*, J. M. Dent and Sons, Toronto, 1917, Ch. 1.

² C. B. Sissons, *ibid.*, p. 26.

³ *Ibid.*, p. 27.

⁴ *Hope Commission, op. cit.*, pp. 409-410. See also R. A. Olmstead, *Decisions of the Judicial Committee of the Privy Council*, Volume II, Queen's Printer, Ottawa, 1954, pp. 57-71.

The Seeds of Discord

Pressure to make English the principal language of instruction in the schools of Ontario appeared after Confederation. In 1889, the then Minister of Education, the Honourable George W. Ross, explained how this came about:

Now, it might be interesting to the House to know the early policy of the Department on this question. You are doubtless aware, Mr. Speaker, that at the time of the organization of our school system in 1846, there were large French settlements in different parts of this Province. You are also aware, no doubt, that the Education Department made provision for the examination of teachers in both French and German, and yet you may be surprised to learn that under Dr. Ryerson's administration, extending over thirty years, the study of English was not made obligatory in either French or German settlements. I do not mention this, sir, to censure the late Chief Superintendent, or to reflect upon the policy of the Department under his administration, and yet I may note that during these long years, with a Conservative administration in power, the greater part of the time, no complaint was made that English was neglected. On my accession to office, my attention was called to this state of affairs, and in 1885 I submitted for the approval of the Lieutenant Governor in Council a regulation, which will be found in the Statutes and Regulations of my Department, by which the study of English is made compulsory in every public school in Ontario.⁵

It was discovered in 1886 that out of 128 schools with 145 "departments",⁶ English was not taught in twenty-seven "departments". Within a year the number was reduced to six, and the authorities hoped that by the following year all schools would be teaching English.⁷

In 1890 the regulations were tightened. The so-called French and German schools were instructed to follow the regular program of the English public schools, using English-language text books; however, they were allowed to teach French or German reading, grammar, and composition as extra subjects. Six years later, in a revision of the Public Schools Act, English was stated officially to be the language of instruction "except where impracticable by reason of the pupil not understanding English".⁸

This situation continued until shortly before the First World War, when the twin issues of religion and language came to the fore on the Ontario political scene. The bitterness then evident among the general

⁵ *Hope Commission, op. cit.*, p. 398.

⁶ At that time the term "department" referred to a school room.

⁷ F. A. Walker, *Catholic Education and Politics in Ontario: A Documentary Study*, Thomas Nelson and Sons, Toronto, 1964, p. 132.

⁸ *Hope Commission, op. cit.*, p. 402.

population over the issue of Roman Catholic separate schools was coupled with a severe split within the ranks of the Roman Catholics themselves. Among the Protestants, many of the Orange Lodges in Ontario called for the closing of Roman Catholic separate schools.

The First Merchant Report

By 1910 education had become an explosive political issue. In that year a committee headed by Dr. F. W. Merchant, a senior official in the Department of Education, was established to investigate and report upon the public and separate English-French bilingual primary schools. In February 1912, the Merchant report was published.⁹ It concluded that, in general, the English-French schools were inefficient and many of their teachers unqualified and inexperienced. It recommended that French be permitted as the language of instruction during the first five years (previously called forms I and II) combined with a steady increase in English each year.¹⁰ The Committee believed that by the time the pupil reached form III, after five years of instruction in the rudiments of English, that language could then become the medium of instruction.

No legislation was introduced to implement the recommendations of the report, but Premier Whitney's government, through departmental regulations, decided that English was to be the sole language of instruction in all forms except in form I, where French could be used. For the year 1912-13, and for that year only, French could be the language of instruction "in the case of pupils beyond form I who, owing to previous defective training, are unable to speak and understand the English language".¹¹ This stand was taken against the advice of John Seath, the provincial Superintendent of Education, who argued that it would be harmful to the interest of the pupils involved and impractical in French-speaking communities.¹² His argument, however, was rejected, and Regulation 17 (the official title was Instructions 17) went into effect for the school year 1912-13.

The French in Ontario immediately protested. They viewed the government's action as inimical to their existence as a cultural and linguistic entity. Beyond form I only French reading, grammar, and composition were to be permitted for not more than one hour per day, and then only as extra subjects. In August 1913, the government to some

⁹ F. W. Merchant, *Report on the Conditions of English-French Schools in the Province of Ontario*, King's Printer, Toronto, 1912. (Hereinafter cited as *Merchant Report*, 1912.) See also C. B. Sissons, *op. cit.*, Ch. 3.

¹⁰ *Merchant Report*, 1912, *op. cit.*, p. 73.

¹¹ *Hope Commission*, *op. cit.*, pp. 421-425.

¹² F. A. Walker, *op. cit.*, p. 266.

degree attempted to remedy these grievances by amending the original regulation. While French could be used on an official basis only in form I, special requests could be made to continue instruction in French beyond that form. Such requests had to be approved by the chief inspector, who set the amount of time for instruction in French. In fact permission often was granted, and in many areas French continued as the language of instruction beyond form I. For the Franco-Ontarians, however, Regulation 17 remained an "odious" and "unjust" attempt at assimilation by the government.¹³

The Second Merchant Report

In 1925 Dr. Merchant was again asked to head a committee of inquiry into the state of the English-French schools.¹⁴ Over a two-year period, the Committee examined approximately 215 English-French schools, both public and separate, and more than 100 English-language primary schools. It reported that many of these schools taught neither French nor English well. At that time, French was used as the language of instruction in two kinds of schools: in the so-called English-French schools, both public and separate, which had their own departmental inspectors; and in the ordinary public or separate schools, which were under the supervision of regular inspectors in the areas where the schools were located. The Committee recommended that for the old classification of English-French schools two categories be substituted, public and separate schools.¹⁵ And it proposed that, to maintain a close watch on the schools in which both French and English would be used as languages of instruction, two new positions be created in the Department of Education: a Director of French Instruction, and a Director of English Instruction.

The Committee stated that no hard and fast rules could be laid down as to the proportion of French-speaking pupils necessary to justify the introduction of French as a subject of study. The two new directors, the chief inspector of public and separate schools, and the local inspector would together make a recommendation, which would then go to the Minister of Education for the final decision.

The Committee further agreed that French-speaking children should be taught in their own language, but that by the end of form IV they should be able to speak English. No explicit direction by regulation should limit the provision of the Public Schools Act governing the

¹³ *Ibid.*, pp. 281-282.

¹⁴ F. W. Merchant, *Report of the Committee Appointed to Enquire into the Conditions of the Schools attended by French-speaking Pupils*, King's Printer, Toronto, 1927, (Hereinafter cited as *Merchant Report 1927*.)

¹⁵ *Ibid.*, p. 25. See also F. A. Walker, *op. cit.*, p. 316.

language of instruction and communication in the schools. In fact a provision of this Act left room for a variety of applications in different schools. It was felt that the only effective means of ensuring proper control over the language of instruction was through the local inspector.¹⁶ The Committee also suggested that the regular program in the bilingual schools be eased, so that the learning of a second language would not prove to be too heavy a load.

In the main, the Committee's recommendations were accepted, although they were not embodied in legislation or in a formal regulation.¹⁷ Regulation 17, technically still in effect, was circumvented, and the publication of the second Merchant report in 1927 marked the end of a period of bitter controversy and the beginning of a new phase of quiet evolution for the primary bilingual system.¹⁸ Symbolic of this new phase was the establishment, in 1927, of the University of Ottawa Normal School. It was created to prepare bilingual teachers, and generally to improve the qualifications of those already teaching.

The Hope Commission

The most recent major inquiry into the position of the bilingual schools was completed in 1950 when the report of the Royal Commission on Education in Ontario (the Hope Commission) was published. The majority report of the Commission pointed out that there was no statute determining fully the use of French as a language of instruction in the Ontario school system, and it took the position that there ought to be. This recognition of French had grown out of "a very natural, and indeed morally justifiable, desire on the part of French-speaking parents to have their children receive instruction in their mother tongue".¹⁹ The Commission found that in the bilingual primary schools French was the language of instruction in all the grades up to grade five, when English (introduced in grade two) began to be used more frequently. In general, however, French remained the basic language of instruction from grades five through eight.²⁰

The Commission supported, for the most part, the findings of the 1927 Merchant report, although it dwelt more strongly on the need for teachers and students to have a sound knowledge of English.²¹ The

¹⁶ *Merchant Report 1927, op. cit.*, pp. 26ff.

¹⁷ *Hope Commission, op. cit.*, p. 414. F. A. Walker, *op. cit.*, pp. 316-317.

¹⁸ Through the provisions of the Ontario Regulations Act, Regulation 17 automatically expired on December 31, 1944.

¹⁹ *Hope Commission, op. cit.*, p. 752.

²⁰ *Ibid.*, pp. 434-435.

²¹ *Ibid.*, pp. 437ff and p. 752.

majority report also recommended the abolition of the University of Ottawa Normal School, on the grounds that pupils in attendance were to their own detriment segregated in their training from others not of French origin. The Commission thought that the other normal schools in the province, with a few modifications to their courses, could perform the functions of the Ottawa school.²² This recommendation was criticized strongly by one of the commissioners in a minority report.²³ The Ottawa school was not closed, and it has continued to render valuable service, now as the Faculty of Education, University of Ottawa.

Secondary Schools

Much of the early discussion of bilingual education in this report has been concerned with primary schools. In Ontario, secondary schools did not begin to develop significantly until the twentieth century. Before that time, most of the population believed that the public or separate schools provided a sufficient education. Although a High Schools Act had been passed in 1871, it contained no specific provision permitting the extension of the primary separate schools through to the end of secondary school. Roman Catholic bishops and newspapers expressed their concern over this omission, but no concerted effort was made to rectify it until well into this century. Both French and English Roman Catholics had always sought exemption from taxes which contributed to the support of public secondary schools. If they had access to public monies, the primary separate schools could be extended to grade thirteen.

The problem of secondary school education for French-speaking students did not become a critical issue until 1928, when Franco-Ontarians were shocked by the decision of the Judicial Committee of the Privy Council in the Tiny Township case. The J.C.P.C. ruled that separate school boards could not receive public funds for secondary schools.²⁴ The decision was based on the view that separate schools were only a special form of common or primary schools, and on the fact that at the time of Confederation separate schools did not extend beyond the primary level. Only the Legislature of Ontario, the decision stated, could change the existing situation by statute or regulation. Thus, both English-speaking and French-speaking Catholics had to attend public secondary schools or enter private institutions.

²² *Ibid.*, pp. 452-453.

²³ *Ibid.*, pp. 895-896.

²⁴ R. A. Olmstead, *op. cit.*, Vol. II, pp. 583-607. See also *Hope Commission, op. cit.*, p. 506; and C. B. Sissons, *Church and State in Canadian Education*, Ryerson Press, Toronto, 1959, pp. 96-101.

In 1950 the majority report of the Hope Commission echoed the ruling in the Tiny Township case, stating that although Roman Catholics were entitled to share public monies for the support of primary separate schools and were exempted from the payment of taxes for the support of the public primary schools, no "similar rights were to be held by Roman Catholic separate school supporters with respect to grammar or other types of secondary schools".²⁵

Conclusion

The present situation can be summarized as follows. There are public and separate *primary* schools in which instruction may be given in French up to the end of grade eight, and in some cases, to the end of grade ten. This latter practice of including grades nine and ten within the elementary system dates back to the time of Confederation, when "secondary education was given in private schools, in 'grammar schools', colleges, or in the common schools themselves, since no specific limitations had been set to their program".²⁶ Later, when public secondary schools were created by the High Schools Act of 1871, grades nine and ten (known as fifth classes) which had evolved within the *separate primary* schools continued, and were never removed from the jurisdiction of the separate school boards.

At the *public secondary* level the situation is as follows. *Français* has been a subject of study in the public secondary schools since 1927, following a recommendation of the second Merchant report. No other subjects could be taught in French, however, until the school year 1965-66, when history, Latin and geography were added.²⁷ Thus, at present, instruction in French is available in only four subjects in public secondary schools.

At the *post-secondary* level there are two bilingual universities, in Ottawa and in Sudbury. The University of Ottawa is one of the oldest institutions of higher learning in the province. It has a teachers' college which furnishes the highest percentage of teachers for the bilingual primary schools. A new teachers' college is being planned for the training

²⁵ *Ibid.*, p. 503.

²⁶ There is some disagreement as to whether this practice existed at the time of Confederation by right or by privilege. In any case, since the turn of the century the separate schools have been allowed by Ontario statute to operate grades nine and ten. For a discussion of this see *Hope Commission*, pp. 458-476; pp. 874-880. F. A. Walker, *op. cit.*, pp. 7-12; pp. 322ff.

²⁷ Ontario, Department of Education, *Report of the Minister of Education, 1966*, Queen's Printer, Toronto, 1966, pp. xvii and 12. (Hereinafter cited as Ontario, *Report of the Minister of Education, 1966*.)

of both primary and secondary school teachers. A new teachers' college is being constructed at Sudbury also, to meet the increasing demand for more teachers in the bilingual primary schools. In the absence of French-language public secondary schools, however, the two universities are not able to attract as many students from Ontario as they would like. Many Franco-Ontarians never reach university because of the difficulties they face in trying to obtain a French-language education beyond grade ten.

French-Language Instruction in Primary Schools

Enrolment and Instruction

The difficulties facing French-language secondary education in Ontario cannot be explained without a comment on the bilingual primary schools. The Franco-Ontarian community is not entirely satisfied with the state of the bilingual primary schools, under either public or separate school boards. Compared with the state of French-language secondary education, however, these primary schools can be considered adequate. The various improvements sought by the Franco-Ontarians at the primary level concern administrative and pedagogical matters, and in most cases these are being worked out.

Bilingual primary *public* schools exist in only two places, Welland and Penetang. All other bilingual primary schools are *separate* schools. As of December 19, 1966, the total enrolment in both public and separate bilingual primary schools was as follows:²⁸

Kindergarten to grade eight inclusive	87,479
Grade nine of elementary schools	2,960
Grade ten of elementary schools	2,787

These figures represent a slight increase over those of 1965 and 1964.

It was noted above that, to teach classes in French in Ontario primary schools, authorization is required from the Minister of Education. If it so desires, any primary school board may establish classrooms or schools for French-speaking pupils, where, with the approval of the Minister, both French and English may be used as languages of instruction. Curriculum 46, revised in 1964, governs the content of the courses of study for French-speaking pupils in primary schools. Today, however, Franco-Ontarians want these administrative arrangements to be given statutory recognition, so that instruction at the primary school level in French in Ontario is guaranteed.

²⁸ Ontario, le Ministère de l'Éducation de l'Ontario, *Circulaire No. 6, 1966-67*, le 19 décembre, Department of Education, Toronto, 1967. (Hereinafter cited as Ontario, *Circulaire No. 6*.)

The amount of instruction in English in the public and separate bilingual institutions varies from school to school. In general, French is the sole language of instruction from kindergarten to grade three. English is introduced as a second language in the middle of grade three. From grades four to eight both languages are used, with English often being used for science and arithmetic.²⁹

A major problem in the public and separate bilingual primary schools is the lack of an adequate supply of French-language textbooks. Although this situation is improving, a shortage still exists.

Finances

For many years, there has been a bitter dispute about the sharing of tax revenues paid by corporations and public utilities.³⁰ Compared with the public schools, the separate schools were not receiving adequate funds. This situation was exacerbated by a decision of the Judicial Committee of the Privy Council, whose ruling on the division of corporation taxes meant that in practice they were paid almost exclusively to the public school boards;³¹ thus the separate schools were deprived of large sums of money. Since 1964 the adoption of the Ontario Foundation Tax plan has greatly improved the situation. The plan seeks to alter the imbalance by grants to the separate schools as well as to public schools in communities with a small corporation tax base. It was hoped that by September 1967 near-equity would be achieved in the total monies received by both public and separate primary school boards.

French-Language Instruction in Secondary Schools

French-language instruction at the secondary level is at present unsatisfactory and imposes a difficult choice on Franco-Ontarian students when they come to select a school for secondary education. They may attend the regular academic or technical secondary schools, where all instruction is in English. If they reside in the proper district, they can attend one of

²⁹ P. W. Fox, *Interim Report on Instruction given in the French Language in the Public School System in Ontario*, p. 2. Memorandum distributed to the Cultural and Educational Subcommittee of the Ontario Advisory Committee on Confederation, May 19, 1966.

³⁰ *Mémoire à la Commission Royale d'Enquête sur le Bilinguisme et le Biculturalisme* (l'Association canadienne-française d'Éducation d'Ontario, 1964), pp. 35-44, 51-52. See also *Brief presented to the Prime Minister and the Minister of Education of the Province of Ontario* by the Ontario Separate School Trustees Association and l'Association des Commissions des Ecoles Bilingues d'Ontario, October 1966.

³¹ *Hope Commission*, pp. 480-481. *Board of Education for City of Windsor vs. Ford Motor Company of Canada Limited*, and others.

the forty "bilingual" secondary public schools in the province which teach four courses in the French language (*français*, history, Latin, and geography) and all other courses in English. Finally, they can enrol in a bilingual and confessional private school, where French is the language of instruction for most subjects, but where fees are charged that may be a financial embarrassment to many families.

Public "Bilingual" Secondary Schools

The Department of Education stated that for the school year 1966-67, 8,739 students attended the public "bilingual" secondary schools³² — that is, schools offering one or more of the four courses taught in French. In addition, it was estimated that there were 10,000 Franco-Ontarian students in technical schools and in public high schools where English was the sole language of instruction.³³ The circular from the Department of Education on the number of pupils in the 1966-67 school year in the public "bilingual" secondary schools recorded an increase over the 1965-66 school year of 754 students taking the four French-language courses: 8,739 studied *français*, 4,211 history, 556 Latin, and 2,424 geography.

Private Secondary Schools

The private Franco-Ontarian secondary schools face a very difficult and uncertain future. In December 1966 their Association published a report on their plight, pointing out that between 1962 and September 1966 their number had dropped from fifty-three to thirty-two.³⁴ This decline was largely attributable to insufficient financial assistance. Without adequate financial aid, the fate of the schools is a slow death.

In the school year 1966-67, the thirty-two private schools had 7,165 pupils. There are, in addition, nineteen bilingual separate schools, offering grades nine and ten, which have another 1,348 students. Thus, there is a grand total of 8,513 French-speaking pupils outside the public secondary schools of the province.³⁵ If the 8,739 students in the public "bilingual" secondary schools taking at least one course conducted in French are added to this total, then over 17,000 students in Ontario are receiving part of their secondary school instruction in French.

³² Ontario, *Circulaire No. 6*, p. 1.

³³ *Mémoire concernant un Régime d'Ecoles Secondaires Bilingues en Ontario*, submitted to the Nineteenth (Special) Conference of l'Association canadienne-française d'Éducation d'Ontario, February 1967, p. 3.

³⁴ Les Ecoles Secondaires Privées Franco-Ontariennes, *Mémoire de la Commission d'Etude de l'Association des Ecoles secondaires privées franco-ontariennes*, décembre 1966, p. 3. (Hereinafter cited as *Mémoire: Ecoles secondaires*.)

³⁵ *Ibid.*, pp. 8, 126.

All thirty-two private Franco-Ontarian secondary schools offer the five-year arts and science course. Three boys' schools offer the four-year arts and science program. Ten girls' schools offer the four-year commercial course. Two girls' schools offer a special commercial course after grade twelve. Only one boys' school offers an industrial arts course.³⁶

These private secondary schools offer the best chance of providing a natural, cultural environment for the Franco-Ontarian student; although even here, as Table 1 illustrates, the student receives much of his schooling in English. Moreover, of the thirty-two private schools now in existence, only seven provide grades nine through thirteen. Eighteen have grades nine through twelve; five offer only grades eleven and twelve; and two offer only grades nine and ten.³⁷

Table 1 shows that science and mathematics are almost entirely taught in English. Only history and religious instruction are given completely in French.

A brief survey of the financial problems of these schools illustrates

TABLE 1
Schools, Subjects and Language of Instruction

Subject	No. of private Franco-Ontarian secondary schools		Instruction in French	
	Grades 9-10	Grades 11-12	Grades 9-10	Grades 11-12
Art	1	1	1	1
Bookkeeping	10	17	6	8
Typing	17	17	14	13
Political Economy or "Marketing"	—	4	—	2
Home Economics	11	8	11	7
Physical Education	23	25	19	15
Spanish	—	5	—	3
Geography	27	18	27	16
History	27	30	27	30
Health	27	30	24	23
Religious Instruction	27	30	27	30
Latin	22	30	21	20
Mathematics	27	30	5	4
Science	27	30	1	—
Shorthand	—	10	—	10

SOURCE: Les Ecoles Secondaires Privées Franco-Ontariennes, *Mémoire de la Commission d'Etude de l'Association des Ecoles secondaires privées franco-ontariennes*, décembre 1966, p. 13.

³⁶ *Ibid.*, p. 12.

³⁷ *Ibid.*, p. 12.

their uncertain future. Although the total cost of education to the Franco-Ontarian private schools is difficult to estimate, their Association, in its December 1966 report, tried to show the average cost per pupil which must be met without government support. In 1964 the average cost per pupil, based on average daily attendance (A.D.A.) in the academic course, was \$712.83. By 1965 this had risen to \$760.38.³⁸

The average private school fees paid annually by Franco-Ontarian parents in September 1966 were \$158.63 for grades nine and ten; \$168.66 for grades eleven and twelve; and \$217.85 for grade thirteen.³⁹ If one deducts these average fees from the average cost per pupil based on the 1965 A.D.A. in the public system, there is a difference of \$601.75 for grades nine and ten; \$591.72 for grades eleven and twelve; and \$542.53 for grade thirteen. The private schools have to make up these differences. In 1966, presumably, the A.D.A. costs were higher and the private schools had to find an even larger subsidy. The report of the Franco-Ontarian private schools considered it a miracle that the schools survived at all, and cited the generosity of various dioceses and teaching orders as well as the sacrifices of the parents, who must pay both education taxes and private school fees. These efforts are no longer sufficient. In June 1966, of the thirty-two schools only six reported a "normal" financial situation. Eighteen said their position was very grave, and eight claimed to be in an alarming state.⁴⁰ The financial condition reported here concerns only the costs of the academic course.

This state of affairs at the secondary level means that unless a pupil has parents with enough money to send him to a private Franco-Ontarian secondary school, he is denied an education in his mother tongue. The four courses offered in the public "bilingual" schools scarcely provide a complete education for the Franco-Ontarian. For the student seeking technical or vocational instruction, there are no choices. He must sacrifice instruction in his language and move to an English-language school. This affects boys of secondary school age far more than girls. Of the 7,165 students in private secondary schools, only 2,678 are boys.⁴¹ The task of learning a second language, and taking new and challenging subjects, is often too great. Thus, many Franco-Ontarians become drop-outs at an early age, having only limited skills and often forced to search for work.

³⁸ Ontario, *Report of the Minister of Education, 1966*, Table 8:43, p. 208. At the time of writing, the A.D.A. figures for 1966 had not been published. As the private schools do not offer the wide range of technical and vocational courses available in the big public composite schools, only the figures for the academic course need be used here.

³⁹ *Mémoire: Ecoles Secondaires*, p. 16.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 8.

Unless a proper solution is found, this situation will have a disastrous effect on the Franco-Ontarian community. In the interest of justice the Franco-Ontarian student should receive the same range of educational opportunities as his English-speaking counterpart; it is also clearly in the ultimate interest of Ontario that he should have these opportunities, since in this way he can become a more valuable citizen of the province.

Policy Alternatives

To meet the needs of French-language education at the secondary school level in Ontario, two policy alternatives are feasible:

- 1) Subsidize the private, French-language secondary schools.
- 2) Make statutory provision for the establishment of French-language public secondary schools.

The first alternative would raise a contentious matter: public support of private educational institutions. If the private Franco-Ontarian secondary schools were publicly supported, then similar demands understandably would be made by many other private institutions. This policy would raise more problems than it settled, and would fail to bring closer the establishment of French-language public secondary schools in Ontario.

The second alternative is preferable. It is one which is strongly supported by many thoughtful English-speaking and French-speaking leaders in education throughout the province. The members of the Cultural and Educational Subcommittee believe it to be a necessary, fair, and just solution.

Other Recommendations

Although Canada is a mosaic of many cultures, official educational rights should be limited to the English and French-speaking groups, the co-founders of Canada. In the public bilingual secondary schools, French should be the principal language of instruction and communication. Yet these schools must also ensure that each student has an effective knowledge of English. It is in the public interest of the province and of Franco-Ontarians that the children in attendance should become genuinely bilingual.

It is important to permit both the Department of Education and all interested parties the freedom to determine the proportion of French-language instruction in the schools. Until now, this matter has been determined largely by English-speaking legislators and administrators. Given the milieu in which the Franco-Ontarian lives, and given modern methods of language instruction, there is little reason to fear that educa-

tion in French-language public secondary schools would hinder the future careers of Franco-Ontarian students.

Many problems of considerable technical complexity will have to be resolved in connection with such schools. Recognizing this fact, on August 24, 1967 Prime Minister Robarts announced that a committee would be formed to examine these problems in detail and make recommendations concerning them.

Courses in Religion

The place of religion in these proposed schools has not been decided. The Subcommittee recognizes that for many Franco-Ontarians language and faith are basic and interrelated components of their culture, and that in their schools they are reluctant to separate them. At the same time, the Subcommittee is mindful that many other Ontarians feel strongly that religion in public schools is not desirable.

For this reason it is recommended that no decision be taken on the religious aspect of the French-language public secondary schools question until the release of the report of the Committee on Religious Education, under the chairmanship of the former Lieutenant Governor of Ontario, the Honourable J. Keiller MacKay.

The Role of School Boards

The French-language public secondary schools, protected by statute, can flourish best within the wider public secondary school system. They should be treated as part of that system, enjoying the same proportionate share of financial assistance as the English-language public secondary schools. This said, however, and remembering the traditional autonomy of elected local school boards, some practical guarantees will have to be provided for French-language public secondary schools. It will be necessary to ensure that:

- 1) The decisions to establish such schools are determined jointly by the local authorities and the Department of Education.
- 2) French-speaking citizens are represented on school boards, particularly in districts where the proportion of French-speaking children provides a clear justification for the establishment of these schools.
- 3) Competent French-speaking educational administrators are appointed to responsible positions throughout the secondary

school system, particularly in districts where the new schools are established.

- 4) No inequitable discrimination can be exercised in the allocation of public monies to such schools.

Teacher Training

As has been noted, it is encouraging that a new teachers' college is being constructed at the University of Ottawa to provide for training at both the primary and the secondary levels. The university's present teachers' college has rendered a valuable service to the bilingual primary schools, and the new one should carry on this tradition by assisting the French-language secondary schools to begin on a solid basis. As the demand increases, an additional secondary school teachers' college also will be necessary. The most feasible site for this school would be Sudbury.

French-Language Texts

Although considerable progress has been made in developing texts written and adapted according to the needs of the Franco-Ontarians, much more remains to be done. In particular, special attention must be paid to providing complementary curricula.

Conclusion

The principle of French-language public secondary schools has now been officially accepted by the Government of Ontario. The problems which remain are administrative and pedagogical, and they can be solved by cooperation among the Department, local boards, teachers, and parents. The creation of the schools should be based on more than a simple departmental regulation. The Subcommittee believes that they should be protected by the authority which only a statute passed by the Legislature can provide. Although it recently has become evident that many English-speaking Ontarians have grown aware of the need to provide for, and are sympathetic to the establishment of, French-language public secondary schools, the Franco-Ontarians understandably want firmer guarantees than friendly attitudes.

The Subcommittee believes that, to be effective, French-language education in Ontario must be complete — that is, it must extend from kindergarten through university in order to provide a comprehensive and sound education. Implementation of this principle will allow French-speaking Canadians in Ontario to maintain their rich heritage and to make a positive contribution to this province and to Canada.

Summary of Principal Recommendations

1) That the Province of Ontario should make provision for the establishment of French-language public secondary schools as soon as possible.

2) That in these schools the principal language of instruction should be French. The proportion of instruction in French should be determined by the Department of Education in consultation with the interested parties.

3) That these schools should be provided for by the enactment of a statute in the Legislature of Ontario.

Concerning a Bill of Rights for Canada and Ontario

W. R. Lederman

A. Notes and Comments Concerning a Bill of Rights for Canada with Particular Reference to the Canadian Bill of Rights (1960).

(This publishes a memorandum submitted to the Ontario Advisory Committee on Confederation in June, 1967.)

B. Supplementary Memorandum Concerning a Bill of Rights for Canada.

(This publishes a memorandum submitted to the Ontario Advisory Committee on Confederation in October, 1967.)

C. A Comment on the Canadian Bill of Rights and the Judgment of the Supreme Court of Canada in the case of: Her Majesty the Queen v. Joseph Drybones.

(Judgment given on November 20, 1969.)

Appendix I The Canadian Bill of Rights (1960).

Appendix II "A Bill of Rights for Ontario."

Consolidated Summary of Recommendations, Report Number Two, September 15, 1969, Royal Commission Inquiry into Civil Rights (Ontario), Honourable J. C. McRuer, L.L.D.,

Commissioner.

(Volume 4, pages 1659-1662)

A. Notes and Comments Concerning a Bill of Rights for Canada with Particular Reference to the Canadian Bill of Rights

I. Nature and Problems of a Bill of Rights

In a short essay entitled 'The Nature and Problems of a Bill of Rights' I have set out what I consider to be the principal issues raised by the enactment of a Bill of Rights for Canada, whether as ordinary legislation or as a specially entrenched part of the Constitution. This essay is reprinted in the first volume of the papers of the Ontario Advisory Committee on Confederation. The *Canadian Bill of Rights* was passed by Parliament in 1960 in the form of an ordinary statute applicable to the federal sphere of law. Prime Minister Pearson's proposal now I believe is that essentially the same provisions should be enacted in each province as an ordinary statute of the province for the provincial sphere of law. In the essay referred to, the following were the chief points made.

(1) When citizens ask to have a Bill of Rights enacted, they are really asking for justice — they are raising qualitative issues about the fairness of the legal system. These are proper questions, but also they are wide-ranging and complex. The more comprehensive the Bill of Rights, the more true this is.

(2) In addition, as a matter of legal or constitutional analysis, there are two other chief points to note. Rights and duties on the one hand should be distinguished from liberties or freedoms on the other. The *right* to vote for instance is something very specific, whereas freedom of speech is something very general and sweeping of extra-legal origin, though it enjoys legal support indirectly and suffers a few specific legal limitations. The second point is that a Bill of Rights is usually expressed concisely in very general terms, yet a legal system must operate specifically through a multitude of particular and detailed rules — thousands of pages in the books of statutes and regulations. This raises problems in the relation of general to particular propositions, and also problems of overlap and conflict between competing general principles. For example, an unlimited 'right to work' is to some extent inconsistent with an unlimited right to 'form and join trade unions', the latter including the union shop and the closed shop. My fear here is that complexity and limitations will not be appreciated and there will be oversimplification — the idea that a Bill of Rights is somehow a panacea for all the ills of society. As I stated in the earlier essay, "A Bill of Rights very properly exhorts us to direct our minds to the general implications for justice of detailed legal actions, but it is quite illusory to think that a Bill of Rights

will do away with difficult conflicts between different persons and groups and eliminate the need for compromise at many points in the operation of our legal system."

Let us now look more closely at the *Canadian Bill of Rights*. In the first place it is confined to individual personal and political rights and, indeed, does not include all of them — for instance it does not mention the right to vote. Neither does the *Canadian Bill of Rights* include economic, cultural, welfare or educational rights, whether for groups or individuals.

Section 1 of the *Canadian Bill of Rights* is as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

Section 2 is mainly concerned with personal freedom from arbitrary detention and with natural justice in procedure before criminal and civil courts and before deciding tribunals and boards generally.

Section 3 provides for centralized review by the staff of the federal Minister of Justice of all proposed federal statutes and regulations to ensure that they do not offend sections 1 and 2.

As was stated, this is far from being a comprehensive Bill of Rights. The great example of a document that does have this comprehensive character is the 'Universal Declaration of Human Rights' of the United Nations. The U.N. document does provide standards that touch and concern everything omitted by the *Canadian Bill of Rights* as well as all items that Statute includes. Accordingly, Prime Minister Pearson's proposal is not as sweeping as it might be. But just what would it mean if the Legislature of Ontario were to enact sections 1, 2 and 3 of the *Canadian Bill of Rights* as law in the provincial sphere for Ontario?

II. The Canadian Bill of Rights as Provincial Law

With regard to section 1 of the *Canadian Bill of Rights*, no doubt the enactment of it in the Province as an ordinary statute would add some-

thing. But it must be remembered that the Province has already done a great deal in the provincial sphere of law by the enactment of *The Ontario Human Rights Code, 1961-62*, as amended in later years including 1967. This Ontario statute is concerned with access to places to which the public is customarily admitted, with the rental of places of business or self-contained apartments and with opportunities for employment. In all these respects there is to be no discrimination "against any person because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons." Still, section 1 of the *Canadian Bill of Rights* would add something (as provincial law) with respect to the recited freedoms of religion, speech, assembly, association and the press. Perhaps it would be a good thing to have these freedoms asserted in a provincial statute. But it should be noted that the federal constitutional picture respecting the asserted freedoms is not clear. For instance on freedom of religion the *Saumur Case* in the Supreme Court of Canada is not clear. We do not know whether freedom of religion is exclusively federal, exclusively provincial, or a concurrent field in whole or part. The same may be said of freedom of the press. This makes it very difficult to predict just what the assertion of these freedoms in a provincial statute would mean.

Section 1 of the *Canadian Bill of Rights* speaks also of the right to property "and the right not to be deprived thereof except by due process of law." This might be construed in either federal or provincial law as requiring judicial determination of the amount of compensation in the event of the expropriation of land. This has been the case in the United States respecting the corresponding portions of the American Bill of Rights. No doubt this would be a good result in this field.

Then also something very important should be noted in relation to section 1(b) of the *Canadian Bill of Rights*. This subsection speaks of the right of the individual to equality before the law and the protection of the law without discrimination by reason of race, national origin, colour, religion or sex. Since the end of March this year, the new Ontario Legal Aid Plan has been in effect. To quote an official spokesman of the Law Society of Upper Canada,

Our profession, as a corporate body, has, at the request of the Government of the Province of Ontario, accepted and undertaken the responsibility for ensuring that as far as possible differences in the economic status of persons within our Province's boundaries, whether residents or visitors, shall henceforth cease to be a factor in the enforcement or determination of their legal rights, of whatever nature, whether in the realm of the civil or criminal law, and whether action requires to be taken, or whether competent counselling on a troublesome problem will suffice. . . .

The Province of Ontario provides funds from the public treasury for the payment of reasonable legal costs and fees to lawyers on behalf of legal aid clients who cannot afford these costs and fees. Again to quote the spokesman of the Law Society:

The foundation and cornerstone of the Ontario Legal Aid Plan is the preservation of a true solicitor and client relationship, with due regard to the rights of the taxpayer to value for his money. This is a concept that . . . has for its objective *real equality before the law for all*.

It is obvious that Ontario leads the way in Canada as a result of this, in providing for equality before the law by provincial legislation. This is one of the most important initiatives taken in one hundred years in the field of civil rights in this country.

As for Section 2 of the *Canadian Bill of Rights*, as was mentioned, this is primarily concerned with natural justice in procedure before courts, boards and tribunals. As enacted by Parliament it applies only in the federal sphere of law, for example to procedure under the Criminal Code of Canada. Section 2 as provincial law would in addition cover procedure in the trial of provincial criminal offences under Section 92(15) of the British North America Act, and generally all proceedings under provincial laws. Perhaps this is worth doing. Nevertheless, in this respect and in others, it should be remembered that the whole area of human rights and fundamental freedoms in Ontario under provincial laws has been under investigation now intensively for about three years by a Royal Commissioner, the retired Chief Justice of the High Court of Ontario, Mr. J. C. McRuer. It might well be premature to take the action Prime Minister Pearson is suggesting before the McRuer Report is in. On the other hand, there is nothing in Section 2 of the *Canadian Bill of Rights* to which one could take objection if it were to be made part of provincial law, indeed quite the contrary.

As for Section 3 of the *Canadian Bill of Rights*, it would be simple enough for the Provincial Department of the Attorney-General to carry out the type of precautionary review of proposed provincial statutes and regulations that is contemplated there. Again, this might be a good thing to provide for.

Finally, in discussing what the *Canadian Bill of Rights* includes and what it leaves out, one should emphasize education. Certainly, so far as French-speaking Canadians are concerned, there is no more important area where group rights are being claimed than in education. This is at present in the provincial sphere of law and is not touched by Prime Minister Pearson's proposal. When one adds to this that economic,

cultural, welfare and language rights are not touched either, it can be seen that Mr. Pearson's proposal does not really involve the major constitutional issues in Canada today. The omission of these things from a document like the Canadian Bill of Rights was to be expected, or at least the omission was the better part of wisdom. It is wrong to think that rights in the fields of economics, welfare or education on the whole should be or can be dealt with by the 'Bill of Rights' technique, which is a matter of simple propositions suitable for application by court orders. Economic measures, welfare and education require complex governmental arrangements, organizations and enterprises which simply do not lend themselves to this technique. By contrast, personal and political rights and freedoms are in the main appropriate for administration by the 'Bill of Rights' technique.

It is now necessary to note that, even respecting those things that are dealt with in the *Canadian Bill of Rights*, there are differences as to the meaning of the statute.

III. Interpretative Alternatives concerning the Canadian Bill of Rights

Sections 1 and 2 of the *Canadian Bill of Rights* are drafted in words that suggest section 1 is merely declaratory and section 2 contains only presumptions as to the construction of other federal statutes, if the latter are unclear or ambiguous in the way they are worded. If the *Canadian Bill of Rights* is to be taken as providing rules for the interpretation of other federal statutes, effective only if there is ambiguity in those other statutes but not if their words are clear, then the *Canadian Bill of Rights* does not mean very much. On the other hand, if the *Canadian Bill of Rights* is to be construed as providing overriding principles amending or repealing any inconsistent federal statutory provision, whether the latter is in plain words or not, then the *Canadian Bill of Rights* will be much more effective. It must be said that the *Canadian Bill of Rights* is itself poorly drafted, since it leaves the choice between these alternative meanings uncertain. Clear words could have been used. As Professor Hans Kelsen has said: "The ambiguity of a legal text . . . is sometimes not the involuntary effect of its unsatisfactory wording but a technique intentionally employed by the legislator, who, for some reason or another, could not decide between two or more solutions of a legal problem, and hence left the decision to the law-applying organs." So, the fate of the *Canadian Bill of Rights*, or of provincial statutes in the same terms, is very much up to the courts, and the issue has now been considered by

the Supreme Court of Canada in the so-called *Sunday Bowling Case* (*Robertson & Rosetanni v. The Queen* (1964) 41 D.L.R. (2d) 485). By a majority of four to one the Supreme Court decided that the plain words of the federal *Lord's Day Act* of 1906 prohibiting the carrying on of one's ordinary business or calling on Sunday were not offensive to the plain words of the *Canadian Bill of Rights* guaranteeing religious freedom. A narrow construction was placed on the scope of 'religious freedom' by reasoning that must be described as rather obscure. Only Mr. Justice Cartwright, in a powerful and logical dissenting judgment, took the line that economic pressure such as compulsory Sunday closing does 'require' an act of religious observance peculiar to Christians and so violates the guarantee of 'religious freedom'. In other words, he held that the *Lord's Day Act* in this respect was repealed by necessary implication because inconsistent with the *Canadian Bill of Rights*. Nevertheless Mr. Justice Cartwright was dissenting, and the majority avoided taking a definite position on the interpretative dilemma that was before them.

The caution of the majority in the *Sunday Bowling Case* may not have been logically elegant, but it is understandable and may have more virtue in it than has Mr. Justice Cartwright's position. Paradoxes and difficulties accompany every proposed solution of such issues. The closed Sunday means that the non-Christian merchant loses money because he cannot sell on a day when he is perfectly willing to do business. On the other hand, the open Sunday means that the merchant who is a believing Christian will lose business to his non-Christian competitor if he, the Christian believer, closes on Sunday in accordance with his religion. Progressive jurists tell us we must judge laws as good or bad according to their actual effects in action in society. Either of these solutions is a preference because it puts economic pressure on one group and not on the other. The open Sunday prefers the non-Christian over the Christian, and vice versa for the closed Sunday. There is no neutral position available. And what of other believers who believe that a day other than Sunday is the holy day? There is no use minimizing the very great difficulty of these issues. One must appreciate the many-sidedness of problems concerning civil rights for the citizens of a thoroughly pluralistic society such as ours. It is interesting that the United States Supreme Court has had the same difficulties concerning Sunday observance in the United States under the specially entrenched Bill of Rights of the American Constitution. They seem to have taken the same cautious position as the Supreme Court of Canada.

In any event, this suggests the final heading of this paper, the problem of special entrenchment of a Bill of Rights in the constitution.

IV. Special Entrenchment of a Canadian Bill of Rights in the Constitution

In the United States, the Bill of Rights is superior constitutional law that can only be changed by the extraordinary and difficult constitution-amending procedure. This puts great power in the hands of the courts as the final interpretative tribunals. On the other hand, in England, civil rights legislation, where there is any, is a matter of ordinary statute and simple parliamentary majorities.

As frequently happens, Canada seems to be in some kind of a posture of compromise between English inheritance and American influence. In England, Parliament and public opinion, more than the courts, function as protective agents for the rights of the citizen. In the United States, by contrast, because these rights and freedoms are expressed in the written constitution itself — particularly in the First, Fifth and Fourteenth Amendments — protection of citizens is primarily in the hands of the courts and so the judges have the last word. This contrast should not be too sharply drawn — the state of public opinion is a vital factor in the United States and the role of the independent judiciary is vital in England. Nevertheless, a definite contrast in jurisprudence and procedure does exist.

Where then does Canada stand by virtue of the *Canadian Bill of Rights* in the form of an ordinary statute? Professor D. A. Schmeiser suggests that we are somewhere in the middle between the English and American positions.¹ I think this is right and agree with him that there is virtue in this situation. The Canadian Parliament does have the last word in the English sense, since the *Canadian Bill of Rights* is one of its ordinary statutes and could be altered or repealed by a simple majority at any time. Hence, parliamentary political decision in the English sense could be final. Yet, politically, the *Canadian Bill of Rights* is not the sort of statute that any parliamentary body could easily change or repeal, though it takes the form of an ordinary statute. So long as it is in the statute book, it confers on Canadian judges important opportunities to strike down Canadian laws inconsistent with the liberties of the citizen thus statutorily declared — opportunities that are very much like those possessed by American judges. Hence Canadian judges, if they choose to be bold about it, may now assert a good deal more influence and power in the field of civil liberties than English judges do. Usually critics deplore the inferior status of the *Canadian Bill of Rights* as an ordinary statute, but this may be a good thing in the end. As a com-

¹ D. A. Schmeiser, *Civil Liberties in Canada*, Oxford University Press, Toronto, 1964, p. 52.

promise between English parliamentary supremacy and American judicial supremacy in this field the Canadian position may turn out to be better than either.

V. Conclusions

In conclusion, my personal opinion is that it might be a good thing to repeat in ordinary provincial statutes the provisions of the *Canadian Bill of Rights*. Provided we stay at the level of ordinary statutes in both the federal and provincial spheres of law, I can see no harm in this. Indeed, some real good might come of it.

Nevertheless, I would repeat two points made earlier.

- 1) No Bill of Rights is a panacea for all the ills of a modern pluralistic western society. Large and oversimplified expectations are dangerous.
- 2) Specifically the *Canadian Bill of Rights*, by its terms, does not touch upon the principal issues and problems concerning our federal constitution in Canada today.

B. Supplementary Memorandum Concerning a Bill of Rights for Canada

My views have already been set before the Committee on the issues involved by two documents: (a) My essay concerning "The Nature & Problems of a Bill of Rights" reprinted in the Background Papers of the Committee, and (b) A memorandum of last June entitled "Notes & Comments Concerning a Bill of Rights for Canada with Particular Reference to The Canadian Bill of Rights".

The latter memorandum was composed on the basis of the original proposal of the Federal Government about a Bill of Rights. This was simply that the Provinces should enact the Diefenbaker Bill of Rights in the form of ordinary Provincial statutes. Since then Prime Minister Pearson has stated that he means a Bill of Rights specially entrenched in the constitution and that he intends it to cover rights to official use of the French language in Canada, and rights of French Canadians to education with French as the language of instruction, in all areas of Canada where there are enough French-speaking citizens to make this practical.²

² This position was later elaborated in a White Paper issued by the Federal Government entitled: "A Canadian Charter of Human Rights," Honourable Pierre Elliott Trudeau, Minister of Justice, Queen's Printer, Ottawa, 1968.

In the light of Mr. Pearson's later statements, I have these comments to add to what I have said previously, relating principally to the matter of special entrenchment. It is my view that special entrenchment of rights and freedoms in the Canadian Constitution should be undertaken only with great caution and on a highly selective basis. Remember that when you specially entrench a particular matter, you take the disposition of it out of the hands of the regular legislative bodies and give the courts the last word about the limitations involved. We need the proper blend of parliamentary supremacy and judicial supremacy, but determining just what is the right blend of these things is a very delicate matter.

In my view, for the most part, we should rely on our ordinary political and legislative processes, i.e. we should work out our fate by ordinary statutes and majorities in the Federal Parliament and the Provincial Legislatures. Our legal system must in some measure undergo a continuous process of adjustment to changing conditions in our society, and change by ordinary statute should continue to be the principal instrument of this adjustment. We must not put too many things beyond the reach of the ordinary majorities of parliamentary government by too much special entrenchment. The business of a government is to govern — to get things done. The proper place for special entrenchment is to safeguard the fundamental political and personal rights upon which our system of representative parliamentary democracy depends. The supremacy of impartial judges can be used to safeguard such things as the right to vote, freedom of expression and assembly, freedom from arbitrary arrest, the right to a fair trial, the right to move freely to any part of the country, and so on.

Also, in our Canadian situation, we must consider very carefully and sympathetically how far it would be wise to go in the special entrenchment of French language rights as they relate to government, the courts and education. In reality, such rights can only be meaningful in areas where there is a sufficient concentration of French-speaking citizens that the use of the French language is practical. Any specially entrenched provision would have to be specifically and carefully qualified in this way. A great deal of what needs to be done in this regard can be done and indeed is being done legally without benefit of specially entrenched guarantees.

C. A Comment on the Canadian Bill of Rights and the Judgment of the Supreme Court of Canada in the Case of: The Queen v. Joseph Drybones³

In comments on interpretative alternatives concerning the *Canadian Bill of Rights* in 1967 (see 'A' above) I made the following statements:

If the *Canadian Bill of Rights* is to be taken as providing rules for the interpretation of other federal statutes, effective only if there is ambiguity in those other statutes but not if their words are clear, then the *Canadian Bill of Rights* does not mean very much. On the other hand, if the *Canadian Bill of Rights* is to be construed as providing overriding principles amending or repealing any inconsistent federal statutory provision, whether the latter is in plain words or not, then the *Canadian Bill of Rights* will be much more effective. It must be said that the *Canadian Bill of Rights* is itself poorly drafted, since it leaves the choice between these alternative meanings uncertain.

. . .

Yet, politically, the *Canadian Bill of Rights* is not the sort of statute that any parliamentary body could easily change or repeal, though it takes the form of an ordinary statute. So long as it is in the statute book, it confers on Canadian judges important opportunities to strike down Canadian laws inconsistent with the liberties of the subject thus statutorily declared — opportunities that are very much like those possessed by American judges. Hence Canadian judges, if they choose to be bold about it, may now assert a good deal more influence and power in the field of civil liberties than English judges do. . . . As a compromise between English parliamentary supremacy and American judicial supremacy in this field the Canadian position may turn out to be better than either.

For the first time, the interpretative issue described in the above quotations was clearly raised late in 1969 before the Supreme Court of Canada. In the case of *The Queen v. Joseph Drybones*, the Court chose the bolder of the interpretative alternatives for the *Canadian Bill of Rights*, by a decisive majority of six to three. The facts of the case raised a clear conflict between an earlier statute of the Federal Parliament and the *Canadian Bill of Rights* of 1960, a conflict that could not be avoided by any rationally possible or sensible restrictive interpretation of the words of the earlier statute. Section 94 of the *Indian Act*, the earlier statute, made it an offence for an *Indian* to be intoxicated *off a reserve*. The Liquor Ordinance of the Northwest Territories made it an offence for

³ (Judgment given November 20, 1969). Reported in (1970) 71 Western Weekly Reports, p. 161-181.

any person to be intoxicated in a public place. The consequent discrimination arising from these two federal laws is described by Mr. Justice Ritchie in the following words.

The result is that an Indian who is intoxicated in his home "off a reserve" is guilty of an offence and subject to a minimum fine of not less than \$10 or a term of imprisonment not exceeding 3 months or both, whereas all other citizens in the Territories may, if they see fit, become intoxicated otherwise than in a public place without committing an offence at all. And even if any such other citizen is convicted of being intoxicated in a public place, the only penalty provided by the Ordinance is "a fine not exceeding \$50 or . . . imprisonment for a term not exceeding 30 days or . . . both fine and imprisonment."

It was clear on the facts that Joseph Drybones had indeed been intoxicated in the Old Stope Hotel at Yellowknife in the Northwest Territories. He had been charged under Section 94 of the *Indian Act*.

Mr. Justice Ritchie then continued as follows:

I think that the word "law" as used in sec. 1 (b) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in sec. 5 (2) (i.e., Acts of the parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that sec. 1 (b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

It is only necessary for the purpose of deciding this case for me to say that in my opinion sec. 94 (b) of the *Indian Act* is a law of Canada which creates such an offence and that it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Bill of Rights*. For the reasons which I have indicated, I am therefore of opinion that sec. 94 (b) is inoperative.

For the purpose of determining the issue raised by this appeal it is unnecessary to express any opinion respecting the operation of any other section of the *Indian Act*.

Quite clearly then, our final court has confirmed the view that the *Canadian Bill of Rights* is of overriding effect in the whole sphere of federal law in Canada. In particular, it is not just an aid to interpretation of earlier or later federal statutes should the wording of those other statutes be unclear. The idea of overriding effect is the one intended by the law officers of the Crown who advised Prime Minister Diefenbaker

in 1960 concerning the *Canadian Bill of Rights*. One of these advisers was Mr. Elmer Driedger, Q.C., who, being Chief Parliamentary Draftsman at the time, drew the actual provisions of the Statute. Writing in 1968 on the subject, Mr. Driedger shows how complex a task it is to draft a general Bill of Rights. He considered that apt words had been used to give the Statute the desired overriding effect. He said:⁴

The opening or general words of s. 2 read as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to. . .

This provision is clearly a rule of interpretation. Granted that Parliament cannot bind itself and cannot bind future parliaments, it may nevertheless lay down the rules that are to govern the interpretation and application of its own statutes. The Interpretation Act is a long-standing example of this technique. The Bill of Rights applies to "every law of Canada," which is defined in subsection 2 of s. 5. The rule of interpretation prescribed by s. 2 is to apply to all laws of Canada, unless it is expressly declared by an act of the Parliament of Canada that any of those laws shall operate notwithstanding the Canadian Bill of Rights. The effect of this provision therefore would appear to be to abrogate the two rules of inconsistency, namely, that a particular statute overrides a general statute and that a later statute overrides an earlier one. Is such a provision effective? Parliament has not said that its own powers are any the less, nor that a future parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a special form of words is used. This does not differ from s. 16 of the Interpretation Act, which says that no provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, unless it is expressly stated therein that Her Majesty is bound thereby, and that Act also states that it applies to every act "now or hereafter passed."

In his reference to interpretation here, Mr. Driedger is speaking of the internal consistency of the whole body of federal laws. It has always been necessary to have interpretative rules of priority to maintain this consistency, when outright conflict occurs between the plain words of two different statutory provisions. Given two inconsistent federal laws, the interpretative rules for priority restore over-all consistency by prescribing full effect for one of them and suspending the operation of the

⁴ E. A. Driedger, 'The Canadian Bill of Rights', in *Contemporary Problems of Public Law in Canada*, O. E. Lang (ed.), University of Toronto Press, Toronto, 1968, p. 37.

other to the extent that it is inconsistent or repugnant. As Mr. Driedger points out, sections 2 and 5 of the *Canadian Bill of Rights* simply provide a special rule of priority when some other federal law is repugnant to a provision of the *Canadian Bill of Rights*. Such a conflict, Parliament has said, is to be resolved in favour of the *Canadian Bill of Rights*. Thus the priority rules for the particular over the general, or the later over the earlier, do not apply in this case. The supremacy of Parliament in the federal sphere of law is acknowledged, as it must be under our constitution, by the declaratory provision in the *Canadian Bill of Rights* that Parliament can give any other federal law priority over the *Canadian Bill of Rights* if it enacts explicit words to that effect. Also, of course, Parliament could repeal the *Canadian Bill of Rights* itself. Nevertheless, the fact is that, politically, either of these last two steps would be quite difficult to take, so the *Canadian Bill of Rights* ends up with an unusually high degree of security as it now stands in the federal statute book. Yet this is not special entrenchment on the American model. In the ways indicated, an ordinary majority of the elected representatives of the people in Parliament may assert final power over the many important matters covered by the provisions of the *Canadian Bill of Rights*.

We seem to have here the formula for a very effective blending of judicial and parliamentary powers, a formula that stimulates appropriate judicial activism in favour of the specified rights and freedoms of the citizen, and yet still gives the last word to an ordinary majority in the democratically elected Parliament of Canada, if Parliament should choose to speak the last word by its normal legislative process. Mr. Driedger's essay on the subject convinces me that I was wrong to say, as I did in 1967, that the *Canadian Bill of Rights* is poorly drafted. The Statute will be very effective by virtue of the meaning intended by the draftsman and now confirmed by the Supreme Court of Canada. No doubt considerable problems lie ahead, but these will now centre upon questions of what is conflict or inconsistency between other federal laws and the provisions of the *Canadian Bill of Rights*. These are difficult questions, but on the whole it is a healthy development that the courts generally must now ask them and face them.

In conclusion, one final significant event should be noted. Two months before judgment was handed down in the *Drybones Case*, the Honourable J. C. McRuer issued his Report Number Two as Royal Commissioner for the 'Inquiry into Civil Rights' in Ontario. The issues respecting a 'Bill of Rights' for Ontario and for Canada are dealt with at length in this Report. The main thrust of the analysis and recommendations is in favour of the ordinary statutory form for a 'Bill of Rights' and against special entrenchment on the American model. The

importance of maintaining the final supremacy of ordinary majorities in our elected parliaments is stressed. The official summary of the recommendations of the McRuer Report in this area is reprinted as Appendix II to these comments. In my opinion it is clear that the majority judgment in the *Drybones Case* has the effect of supporting, and emphasizing the validity of, the McRuer Report's analysis and recommendations.

Appendix I

The 1960 Canadian Bill of Rights

8-9 ELIZABETH II

CHAP. 44

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

[*Assented to 10th August, 1960.*]

Preamble.

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

Recognition and declaration of rights and freedoms.

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

Construction of law.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a

party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Short title.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

PART II

Savings.

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

"Law of Canada" defined.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Jurisdiction of Parliament.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

War Measures Act, R.S., c. 288.

6. Section 6 of the *War Measures Act* is repealed and the following substituted therefor:

Coming into force by proclamation.

"6. (1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

Proclamation to be submitted to Parliament.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

Opportunity for debate.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

Revocation of proclamation by resolution.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

Canadian Bill of Rights.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

Appendix II

"A Bill of Rights for Ontario." Consolidated Summary of Recommendations, Report Number Two, September 15, 1969, Royal Commission Inquiry into Civil Rights (Ontario), Honourable J.C. McRuer, L.L.D., Commissioner (Volume 4, pages 1659-1662).

Principles of a Bill of Rights

579. A Bill of Rights should first be considered for the persuasive and rational impact it will make on the ordering of society and not for its authoritative form.
580. The consideration of a Bill of Rights should take into account that the highest recognition of the equality and final worth of human individuals in the realm of politics and law is the right of each to vote on the basis of universal adult suffrage in periodic and free elections, where the constituencies are so arranged by population that one man's vote is substantially as great in influence as another's.
581. A philosophy of government should not be adopted which deprives the people of the ultimate right to determine their own social affairs through democratic processes and transfers the final power of decision in certain areas to appointed officials — the judges.
582. The modern democratic Canadian Parliament and Legislatures should be considered to be superior to the courts in their title to primacy in major decisions of social policy. Parliamentary bodies have the matching institutional design and procedure.
583. It would be unwise for a government to lock itself into a constitutional strait-jacket where the making of new laws to meet changing social conditions would be made almost impossible by reason of the difficulty in obtaining relief through amendment to the constitution.

Federal Bill of Rights

584. The entrenchment of a national Bill of Rights should not be considered until a flexible amending procedure for the constitution is decided upon.
585. Ontario should not compromise the areas of legislative jurisdiction that it now enjoys by agreeing to constitutional entrenchment of a national Bill of Rights. If there is to be a readjustment of subjects between the federal and provincial governments it should be by

express agreement and not indirectly through the entrenchment of a Bill of Rights.

Entrenchment of a Provincial Bill of Rights

586. Full consideration should be given to the grave doubts that exist as to whether the Province of Ontario could entrench a Provincial Bill of Rights by enacting a statute passed by ordinary majority which could only be amended or repealed by a statute passed by a greater majority than an ordinary majority.
587. Even if Ontario could entrench a Provincial Bill of Rights by a statute passed by an ordinary majority which would require more than an ordinary majority of those voting in the Legislature to repeal or amend it, this should not be done. It is wrong in principle for one parliament to seek to bind a succeeding parliament and the new class of voters electing that parliament.
588. In any case if entrenchment of a Bill of Rights is considered feasible it should be confined to the definition of the individual rights which themselves are the foundation of parliamentary democracy and these should be expressed in carefully qualified terms.

A Statutory Provincial Bill of Rights

589. The Province should adopt a Bill of Rights enacted in ordinary statutory form as was done in Saskatchewan.
590. The state should declare in appropriate language the following rights and freedoms which are the foundations of parliamentary democracy:
 - (1) The right of every person to freedom of conscience and religion.
 - (2) The right of every person to freedom of thought, expression and communication.
 - (3) The right of every person to freedom of assembly and association.
 - (4) The right of every person to security of his physical person and freedom of movement.
 - (5) The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.
 - (6) The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for

the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.

- (7) The right to have the ordinary courts presided over by an independent judiciary.

The statute should also include the rights and freedoms set out in the Canadian Bill of Rights but not included in the rights and freedoms we have enumerated.

591. There should be no attempt to qualify in detail the general statement of rights and freedoms nor to catalogue exceptions.
592. It should be made clear in general terms that the rights and freedoms are not absolute but are subject to proper limitations.
593. It should be stated that the declaration lays down guidelines for legislators and presumptions for interpretation of legislation to be followed by courts and tribunals.
594. No attempt should be made to incorporate the provisions of the Ontario Human Rights Code in the general declaration of rights and freedoms. It should be dealt with as a specific piece of legislation.
595. The Ontario Bill of Rights should not deal with language rights. Those rights should be dealt with in specific legislation, not in general terms.
596. A Bill of Rights properly drawn should be educative; it should bind the consciences of legislators, establish standards for public appraisal of legislation and alert a vigilant press.

Thoughts on Reform of the Supreme Court of Canada*

W. R. Lederman

An important part of the current constitutional review in our country is consideration of the extent to which changes are needed in the status, structure and functions of the Supreme Court of Canada. This is a large and complex subject, and, in attempting within the limits of an essay of moderate length to survey the whole field, I can only identify and comment briefly on the main issues. In doing this, I write in the first person to emphasize that I am simply expressing my own views, as a student of things constitutional, for what they may be worth.

In the first place, I believe I can take it for granted that everyone accepts the proposition that a supreme interpretative tribunal — a judicial tribunal — is necessary to the working of a federal constitution. Such a tribunal must have the last word on whether provincial or federal statutes are within or beyond the powers listed in the constitution for the enacting legislative body. We are used to this in Canada in relation to distribution of legislative powers but now we are also talking of the possibility of a specially entrenched Bill of Rights like that of the Americans. Such a Bill of Rights means that some undesirable types of laws are forbidden to legislative bodies, being things they cannot do by ordinary statute, and again a supreme judicial tribunal would be needed to make *this* work.

The main matters for comment seem to fall into two groups.

(1) What should be the principles and doctrines of interpretation that are the operating rules of the supreme interpretative tribunal for a federal country?

(2) What should be the composition, status and jurisdiction of this supreme tribunal? These two questions are interdependent to a degree,

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of course, because how an institution functions depends very considerably on how it is composed, on the background and training of its members and on the terms on which they hold their offices.

Let me speak first then of doctrines and methods of interpretation in the courts, with particular concern for interpretation of the distribution of legislative powers by the B.N.A. Act between the Federal Parliament on the one hand and the Provincial Legislatures on the other. To my mind there are principally two types of interpretation — literal or grammatical interpretation emphasizing the words found in statutes and constitutional documents — and, sociological interpretation which insists that constitutional words and statutory words must be carefully linked by judicially noticed knowledge and by evidence to the ongoing life of the country.

In my view, both the Judicial Committee of The Privy Council and later the Supreme Court of Canada have been too much devoted to literal or grammatical interpretation and have not employed sociological methods enough. I think this is the central issue concerning interpretation of our federal constitution and its development by interpretation. I am not much interested in the old controversy about whether the Judicial Committee of the Privy Council perverted the B.N.A. Act by giving too much power to the provinces at the expense of the Federal Parliament and Government. The O'Connor Report to the Senate maintained this was so,¹ but Mr. O'Connor made his points by arguments dependent on literal or grammatical interpretation. This type of interpretation gives an appearance of reliability and consistency, but this is only appearance.

As Hans Kelsen has said:²

Since the law is formulated in words and words have frequently more than one meaning, interpretation of the law, that is determination of its meaning, becomes necessary. Traditional jurisprudence distinguishes various methods of interpretation: the historical, in contrast to the grammatical, an interpretation according to the "spirit," in opposition to a literal interpretation keeping to the words. None of these methods can claim preference unless the law itself prescribes the one or the other. The different methods of interpretation may establish different meanings of one and the same provision. Sometimes, even one and the same method, especially the so-called grammatical interpretation, leads to contradictory results. It is incumbent upon the law-maker to avoid as far as possible ambiguities in the text of the law; but the nature

¹ The Senate of Canada, Report on the B.N.A. Act, by W. F. O'Connor, Queen's Printer, Ottawa, 1939.

² *The Law of the United Nations* (1951) at xiii.

of language makes the fulfilment of this task possible only to a certain degree.

A very interesting book has recently been published on the Privy Council's interpretation of the B.N.A. Act.³ Its author is Professor G. P. Browne of Carleton University, and in my view Professor Browne has beaten Mr. O'Connor at his own game. Professor Browne, using methods of grammatical or literal interpretation, shows that one can find much justification *at this level* for the interpretations placed on the B.N.A. Act by the Judicial Committee. So, in my view, Browne and O'Connor simply cancel one another out. The truth is that the B.N.A. Act was simply ambiguous or incomplete in many respects as originally drafted and the answers just were not in the Act as to how these ambiguities were to be resolved and the gaps filled.

The much-abused Viscount Haldane knew this.⁴

The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies . . . that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

To Viscount Haldane's political obscurities of language we should add the degree of obscurity that is inherent in language itself. This arises from the truth that words are not perfect vehicles of meaning, so that no matter how skilfully they are chosen and used, uncertainties about their meaning to some extent remain. This philosophically deeper type of obscurity is what Professor Kelsen was referring to as giving rise to the need for authoritative interpretation to choose between the alternatives that will frequently appear when even the most carefully drafted constitution, statute or legal document is to be applied to the institutions, persons and circumstances the words are alleged to contemplate. In any event, the Judicial Committee did resolve ambiguities and fill gaps, as indeed it was their constitutional duty to do. I am not happy with certain of their decisions on the merits, but nevertheless I do not think the Judicial Committee should now be disparaged for having failed to find

³ *The Judicial Committee and the B.N.A. Act*, (1967) University of Toronto Press.

⁴ *John Deere Plow Co. Ltd. v. Wharton* [1915] A.C. 330 at 338.

answers in *the text* of the B.N.A. Act that just were not there to be found.

Also, to be fair to the Judicial Committee of the Privy Council they did not just employ grammatical interpretation in their cases from Canada. They knew that interpretation had to pay some attention to the social, political, cultural and economic facts of life in Canada. I remember listening to the argument concerning the Alberta Debt Adjustment Act before the Privy Council in 1943. The Honourable J. W. Estey, then Attorney-General of Saskatchewan, was arguing for the validity of the Alberta statute because his province had a similar statute that would fall if the Alberta Act fell. Before Mr. Estey started his legal argument, the Lord Chancellor asked him to explain why such drastic anti-creditor legislation was necessary at all. Mr. Estey then took some time to tell the story of the double disaster of drought and market collapse in the 1930's that had brought agriculture on the Canadian Prairies to its knees, so that some such measures as these were needed just to keep the farmers on the land so that they might try again. At this point, Lord MacMillan remarked, "Very well, Mr. Estey, the malady is admitted. Now, who is to be the physician?"

The Law Lords of the Privy Council then were often very astute about Canada, but, nevertheless, my complaint against them is that they did not seek often enough or systematically enough to relate interpretation to the facts of life in Canadian Society. Their interpretation was too much literal and not enough sociological. And also, since the judges of the Privy Council were not Canadians living under our federal constitution, there were a great many things they simply did not know as background knowledge of Canada. In more technical language, the scope of their relevant judicial notice was much narrower than that of Canadian judges. Many outstanding British judges sat on the Judicial Committee, but the handicap just mentioned is one that ability and integrity alone cannot overcome. Canadian judges also have been too literal and grammatical in their interpretations of the constitution, though operating as they did for so long in the shadow of the Judicial Committee, they had little choice about this. Nevertheless, I think Canadian judges should now combine the advantage of their superior native judicial notice of Canadian conditions with systematic and thorough sociological interpretation of the constitutional distribution of powers. The real prospect for improvement in interpretation lies in more intensive and extensive judicial appreciation of social, political, economic and cultural facts that give the various aspects of challenged statutes their relative importance in relation to the categories of federal and provincial legislative powers. The rules of evidence for constitutional cases should permit wide-ranging

enquiry, expert opinion and gathering of facts to aid in the decisions to be taken. In my view, this is the only way to get meaningful, consistent interpretation of the federal distribution of legislative powers. It is an illusion to think that security and certainty in the interpretation of a federal constitution can be obtained by literal or grammatical methods of construing meaning. I am convinced that many of those who advocate extensive re-writing of the constitution for Canada do so because they have too much faith in what can be accomplished by words in documents, that is, too much faith in the value of literal interpretation.

But I do not want to press this point too far. Words are, within limits, reasonably objective means of communication and of thought, otherwise social organization and legal institutions would be impossible. The main thrust of my argument here is to emphasize that good constitutions are characteristically rather succinct documents that achieve a beneficial brevity by employing quite general and abstract phrases. For example, in the B.N.A. Act, the following are examples of such words and phrases used to distribute primary legislative powers and responsibilities: 'Trade and Commerce,' 'Property and Civil Rights,' 'Defence,' 'Municipal Institutions,' 'Criminal Law,' 'Banking' and so on. These phrases are clear enough in some of their implications and not so clear in others. In any event they often overlap one another and conflict to some extent in their logical relevance to particular legislative schemes to be found in federal or provincial statutes the validity of which is under challenge in the courts. It is between the alternatives thus arising that the judicial interpretative tribunal must choose. The nature of this task can perhaps best be explained by refining and expanding Lord MacMillan's question — Who is to be the physician? The full question the judges must put to themselves is — Who is the better physician, Federal Parliament or Provincial Legislature, given the type of legislative scheme under consideration and all the relevant circumstances? Issues of relative constitutional values are involved here for the judges, and such issues can best be assessed and decided in the light of all that can reasonably be ascertained of the effects of the challenged statute as operating law for the persons and social conditions contemplated by the terms of the statute.

Professor B. L. Strayer has shown that both the Judicial Committee in London and the Supreme Court of Canada have at times in the past accepted various rules of practice and evidence that collectively would permit the thorough ascertainment of crucial facts concerning the effects and social context of a challenged statute — rules concerning judicial notice, admissions, agreed statements of fact, direct evidence and opinion evidence from experts.⁵ Professor Strayer complains that, though

there are adequate procedures available as indicated, they are just not yet being used regularly enough or systematically enough by counsel or by judges in constitutional cases (including reference cases). Too often this is because the truly complex nature of federal power-distribution issues is simply not appreciated and accepted by Canadian lawyers and judges. Professor Strayer's conclusion is as follows:⁵

It has been demonstrated that many elements, both factual and non-factual, enter into the determination of these questions. Once these elements are identified their relative importance can be better assessed. It submitted that the factual elements have yet to receive the attention they deserve, largely because of the confusion over the purpose of fact-introduction in constitutional cases. The importance of facts has been demonstrated, and the means of introduction suggested. A more general recourse to facts, particularly those pertaining to legislative effect, would diminish the importance of other elements in the adjudicative process and yield a more realistic jurisprudence.

Finally, in considering principles and doctrines of interpretation in the final court for federal power-distribution issues, there is the matter of adherence by the court to precedents embodied in its own previous decisions. The Judicial Committee of the Privy Council had the power to depart explicitly from its own previous decisions, including those in Canadian constitutional cases. But no counsel ever persuaded it to do so, or at least to admit it was doing so, in Canadian constitutional cases. On the whole, the Judicial Committee was careful to follow its own previous decisions where they were found to be applicable because of sufficient similarity in the type of statute or issue concerned as between a previous case and a new one. We will return presently to the question of what is 'sufficient similarity' in federal power-distribution cases.

Meanwhile, it should be noted that the Supreme Court of Canada has taken the conservative and orthodox position that it is bound to follow its own previous decisions when sufficiently similar cases recur.⁷ This contrasts with the position of the Supreme Court of the United States which explicitly claims and not infrequently exercises the power explicitly to depart from its own previous decisions. Until quite recently, the highest appellate court of the United Kingdom, the House of Lords, considered itself fully bound to follow its own previous decisions. But a short time ago, on behalf of the Law Lords composing the court, the

⁵ *Judicial Review of Legislation in Canada*, (1968) University of Toronto Press, chapter 6.

⁶ *Supra*, n. 5 at 181.

⁷ See Mark R. MacGuigan, *Precedent and Policy in The Supreme Court*, (1967) 45 Can. Bar Rev. 627-665.

Lord Chancellor announced that, while normally they would treat their own previous decisions as binding, they would henceforth "depart from a previous decision when it appears right to do so."⁸

It is not surprising then that we find the Government of Canada proposing to the Constitutional Conference of February, 1969, that "The Constitution should authorize the Supreme Court of Canada to depart from a previous decision when it appears right to do so."⁹ It was made clear in the comment accompanying the proposal that this was to be a permissive provision leaving it entirely to the court itself to determine when it was 'right' to depart from precedent because 'circumstances demand it.'

I would offer three comments on this proposal. It is indeed wise and proper to ensure that the Supreme Court of Canada has this power and knows that it has it. But, in federal power-distribution cases, how is the court to determine, when it is 'right' to depart from precedent because 'circumstances demand it'? It can make this judgment rationally and with appropriate social sensitivity only if the relevant facts of legislative effects concerning the challenged statute are before it. This simply adds emphasis to the general points made earlier about the need for more socially sensitive interpretation — that the rules of practice and evidence for constitutional cases should permit wide-ranging enquiry, expert opinions, liberal judicial notice and direct evidence of critical facts, to aid and illuminate the value choices that have to be made. Perhaps the Constitution or the Supreme Court Act should contain a liberal permissive provision on *this* subject too, so that Supreme Court judges will not in future be able to say that they are bound by narrow exclusionary rules of practice or evidence in constitutional cases.

Nevertheless — and this is my second comment on precedent — even if the Supreme Court is given power to depart from its own previous decisions and adopts more liberal rules of practice and evidence, adherence to precedents is the normal thing and indeed is the normal expectation of the people as a matter of justice. Reasonable consistency over time is one of the basic elements of justice. Certainly there should not be a slavish or mechanical following of precedents, though it should indeed be the usual thing in sufficiently similar circumstances. But this leads to the most fundamental of all questions about adherence to precedent — What is a precedent anyway? There are always some differences between past and present circumstances when one is comparing previous cases with a new case. When are the previous circum-

⁸ [1966] 1 W.L.R. 1234.

⁹ Right Honourable P. E. Trudeau, *The Constitution and The People of Canada*, 1969, Queen's Printer, Ottawa, at 82.

stances sufficiently similar to the new ones to make the previous case a precedent for the new one? When are the differences significant enough that the previous case can be dismissed as *not* amounting to a precedent?¹⁰ This is the third matter for comment.

The philosophy and logic of precedent is the subject of an extensive literature that cannot be recapitulated here. Nevertheless, we can review briefly the special case of federal power-distribution issues in this respect. Typically, the final court is asked in this kind of case to decide whether a specific legislative scheme that has been passed as a statute by the Federal Parliament or a Provincial Legislature is within or beyond the powers of the enacting body. To do this the Court must assess the full meaning and main feature or features of the challenged statute, as manifest in the words of the statute and the effects it will have as operating law in the current social context. Its main theme or purpose then has to be classified in relation to the general categories of federal and provincial powers respectively, in the B.N.A. Act, to which reference was made earlier. So the basic subject of a federal power-distribution case is the challenged regulatory scheme designed to deal in a certain way with certain of society's problems and needs. As social problems and needs shift and develop, somewhat new statutory schemes are devised to deal with them. At times the new regulatory schemes in their social context will be sufficiently similar to those involved in previous power-distribution cases to be governed by the decisions in those previous cases as precedents. But when the social need for regulation and the regulatory scheme proposed are sufficiently new, then there is no precedent *just a matter of the logic and philosophy of the theory of precedent itself*. Then, without the aid of binding precedent, the Court must boldly face Lord MacMillan's question in the refined and expanded form I suggested for it. In the *John East Case*,¹¹ for example, the Privy Council did essentially ask themselves this question. They were, in 1944, considering a rather new scheme for the regulation of the relations of management and labour in industry, as enacted by a Provincial Legislature. They said in effect — If the Fathers of Confederation were in our position today and knew current social and industrial conditions as we know them, would they as reasonable men consider this scheme of regulation a proper one to be assigned to Provincial Legislatures? They answered the question in the affirmative and held the provincial statute valid.

¹⁰ See "The Common Law System in Canada" by W. R. Lederman, in *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (editor E. McWhinney) 1958, University of Toronto Press, at 34-70.

¹¹ [1948] 2 W.W.R. 1055.

In other words, the doctrine of precedent itself is a realistically flexible instrument of adjustment, if controlled by imaginative use of history and full fact-finding about legislative effects and relevant social context. There is nothing in logic or philosophy, properly conceived, that precludes this flexibility. Indeed, logic frequently displays two or more alternatives for a final federal court but logic alone in such circumstances does not dictate the choice between them. We may conclude then that if the judges of the Supreme Court of Canada are moved by a flexible and imaginative conception of the doctrine of precedent, the need for them to use a power explicitly to depart from their own previous decisions would be rather rare.

I have expressed these views of the nature of precedent and federal power-distribution decisions in other places.¹² Some who disagree hold that this is too Olympian a view of the position of the final court interpreting a federal constitution. My answer is twofold. I have conceded that frequently the Court will find that there are sufficiently similar cases in the past, so that the doctrine of precedent should operate. But, not infrequently, the Court will also be confronted with a case where the elements of novelty are great enough to preclude the direct relevance of any precedents. Then indeed the judges inevitably find themselves high up on Mount Olympus, whether they like it or not, with a very broad discretion to be exercised about the proper situs of primary legislative power in our federal country. They must then proceed as wisely as they can by considering the original words of the constitutional distribution of powers in the B.N.A. Act, in relation to the new legislative scheme and all that can be reasonably ascertained of its effects and the circumstances in which it would be operative. We are back then to the importance of rules of practice and evidence for fact-introduction about legislative effects and social conditions. I conclude with what I said of the interpretative process in an earlier essay.¹³

In summary then, we can now see that the classification process joins logic with social fact, value decisions and the authority of precedents, to define the distribution of law-making powers. The reasoning involved is not automatic or mechanical; rather it makes the highest demands on learning, intellect, and conscience. It permits expression to the real issues of public policy in the country, and indeed brings such issues into focus in many particular ways, thus facilitating their resolution. The point is that, so long as we have a federal constitution, we must be prepared to contend with

¹² See W. R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in *The Future of Canadian Federalism* (editors Cr  peau and Macpherson) 1965, University of Toronto Press at 91-112.

¹³ *Supra*, n. 12 at 108-9.

the real complexity of the interpretative process. In other words, what has been described above is the inevitable operating jurisprudence of the federal form of social order. If we understand the process, we will expect neither too much nor too little of the constitutional distribution of legislative powers as it stands now, or as it may be if certain changes are made. There is much more room for reasonable differences of interpretation than most people realize. These differences then should not be regarded as evidence of bad faith or ignorance; rather, they should be taken as a challenge calling for support of the working of our system of interpretation at its best level.

There we must leave the subject of doctrines of interpretation in federal power-distribution cases and move on to the second set of questions that should be discussed, namely those concerned with the composition, status and jurisdiction of the Supreme Court of Canada.

Concerning this second group of matters, let me first repudiate, for myself at least, a view that seems to have some currency at present. I do not accept the view that the Supreme Court of Canada judges are somehow under unfair or undue influence by the Federal Parliament and Government because the Federal Parliament enacted the Supreme Court Act and the Federal Cabinet appoints the judges. The Supreme Court of Canada is an impartial and objective judicial tribunal in the fullest sense. As such it is an important part of our great English constitutional inheritance — the typical English Superior Court as it stood after the Act of Settlement in 1701. It is a serious misunderstanding of the independence of our courts and judges to think of the judges of the Supreme Court of Canada as somehow delegates of the Federal Government. I reject this delegate theory. Nevertheless, I would agree that the Supreme Court of Canada should appear to be as impartial as in truth it has been and is. Justice must not only be done, it must be seen to be done. To this end, some changes could be made in the manner of appointing the judges and in the constitutional status of the court, changes that will be discussed presently.

Also, there is a very general proposal to alter the nature of our final federal court that should be carefully assessed at this point. It is proposed that the Supreme Court of Canada should be a final court for constitutional questions only, rather than what it is at present, namely a general court of appeal for Canada on the full range of justiciable issues under the laws of Canada and the Provinces — which includes, but is by no means confined to, federal power-distribution issues under the B.N.A. Act.¹⁴

¹⁴ See Jacques-Yvan Morin, *A Constitutional Court for Canada*, (1965) 43 Can. Bar Rev. 545-552.

I consider that the status of the Supreme Court of Canada should be maintained as a general court of appeal for Canada and as the final interpretative tribunal to determine the meaning of the federal constitution. In this connection the all-pervasive character of constitutional questions should be appreciated. A citizen may need to raise a constitutional issue at any time in connection with any type of matter at any level in our judicial system. The citizen charged with the provincial offence of careless driving should be able to plead in the Magistrates' court that the provincial statute concerned is *ultra vires* of the Province under the B.N.A. Act. Then the route of appeals should be open all the way to the Supreme Court of Canada if either party seeks to go that far. Moreover, the Supreme Court of Canada must be able itself to control what appeals are allowed to go through to it because they raise significant constitutional issues. The Court itself must have the final power to give leave for any appeal in the foregoing category.

Furthermore, constitutional issues arise in connection with other legal issues; they usually come as part of a complex package. The Supreme Court of Canada should then remain a general court of appeal on all legal issues. To appreciate and do justice concerning the constitutional issue itself, the Court must also be able to appreciate and do justice concerning the *other* legal issues that are inextricably a part of the complex in which the constitutional issue occurs. For example, the Quebec Padlock Law was challenged in connection with the breaking of a lease of an apartment in the City of Montreal. Did breach of this law justify the landlord in repudiating the lease?¹⁵

The complex and all pervasive nature of federal power-distribution issues may be better appreciated if we recall the nature of these issues. The federal constitution distributes law-making powers between the Federal Parliament on the one hand and the Provincial Legislatures on the other by two lists of classes or types of laws, one federal and the other provincial. These two lists together give a classification system for all the laws of Canada and the Provinces, laws disposing of the rights, duties, powers and liberties of Canadians. When some of these laws, existing or proposed, are challenged as beyond the powers of the Federal Parliament or a Provincial Legislature, judges who appreciate the whole system of law are needed to assess the theme, purpose and effects of the

¹⁵ For an excellent exposition of the interdependence of laws and issues, with particular reference to the inter-action of Civil Law and Common Law concepts in Quebec cases, see Gerald E. Le Dain, Q.C. "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level", *la Revue Juridique Thémis* (1967), University of Montreal, 107-126. Dean Le Dain makes a very convincing case for maintaining the general appellate jurisdiction of the Supreme Court of Canada, covering non-constitutional as well as constitutional cases.

particular challenged law in its living context. There are competing issues of classification and competing precedents, so that any type of law may be challenged at one time or another in our history. This all-round appreciation of the total legal system then is necessary background and competence for the proper disposition of any federal power-distribution issues that may come up. Such a constitutional issue cannot be separated from the nature and effect of the statute the validity of which is being challenged. The plain implication here is that the more learned a judge is in all the main departments of the law — family law, criminal law, property law, commercial law and so on — the better qualified he is to decide wisely federal issues concerning the situs of the powers to pass these various types of laws.

It also follows that the best federal constitutional court is one that has a general as well as a constitutional appellate jurisdiction, because the appellate judges, in their non-constitutional cases, are ranging over many issues in all the principal departments of the total legal system. Thus they 'keep their hands in', so to speak, as reasonably expert and knowledgeable professional persons concerning all the main types of laws and current social problems. Moreover, as the French Civil Law obtains in many respects in Quebec and the English Common Law obtains in corresponding respects in the other Provinces, the judges of the Supreme Court of Canada have to educate one another in the essentials of these two systems, as often this will be necessary to full appreciation of the implications and merits of federal power-distribution decisions. The record of the Supreme Court of Canada is good in the field of English-French comparative jurisprudence.¹⁶

Nor should we think only of constitutional issues in the Supreme Court of Canada, as has already been mentioned. If the constitution belongs to the people, then the citizen with a reason to do so is entitled to raise a constitutional issue of invalidity, to avoid the application of a law to himself, in any court of original jurisdiction in the land. Provincial courts of original jurisdiction and Provincial courts of appeal will frequently have to rule on such issues. At times the litigants will be satisfied with the answers they get in the Provincial courts, particularly in a Provincial court of appeal. Or, if they are not, the Supreme Court of Canada will have the assistance of the judgments in the lower courts. Also, if the suggestions made later in this essay are followed, the Supreme Court of Canada would be able to refuse to hear a further appeal to itself, if the disposition of the case in the Provincial court of appeal is deemed satisfactory by the Supreme Court of Canada judges who hear

¹⁶ *Supra*, n. 15.

an application for leave to appeal. The Supreme Court of Canada is at present seriously over-loaded with work, and, as we shall see presently, there is a grave need for better screening of cases on appeal so that only those of true national importance are permitted to engage the attention of the final tribunal.

Let us now consider this and certain other changes in the composition, status and jurisdiction of the Supreme Court of Canada that would better enable the Court to discharge its vital functions in our society. First I list these proposed changes briefly and then discuss them in some detail in the order given.

- (a) The number of judges might be modestly increased, to improve the national character of the Court and its capacity to function in panels for its non-constitutional cases.
- (b) The device of the official nominating commission might be used to suggest names of suitable prospective judicial appointees to the Federal Government. The Provinces could be represented on these nominating commissions and thus have some influence in the selection of judges for the Supreme Court of Canada.
- (c) The essential provisions concerning the structure and powers of the Supreme Court of Canada should be specially entrenched in the Constitution, thus avoiding even the appearance of the possibility of any undue influence by the Federal Government or Federal Parliament on the Court.
- (d) The rules governing appeals to the Supreme Court of Canada should be changed so as to limit the total work-load of the Court to cases, both constitutional and non-constitutional, that raise issues of true national importance, the Supreme Court judges themselves having the last word on whether a nationally significant issue of this character is involved.

The questions of a modest increase in the number of Supreme Court judges and the use of official nominating commissions may be considered together. At present, the requirement that three of the nine judges should come from Quebec is statutory, but it is also just about as firmly established by convention that, of the remaining six, three should come from Ontario, one from the four Atlantic Provinces and two from the four Western Provinces. I believe the principal defect here to be the under-representation of the Atlantic region and the Western region. I would increase the Court to a total strength of eleven, giving an additional judge to the Atlantic region and the Western region. The result would then be as follows:

Atlantic Provinces	2
Quebec	3
Ontario	3
Western Provinces	3

11

In this event, the quorum for a federal constitutional case could be nine of the eleven (instead of seven of the nine at present). Thus a collegiate approach of the court to federal power-distribution issues would be preserved. Non-constitutional cases could be dealt with by smaller panels, and the presence of more judges would facilitate this. Civil Law judges could be appointed *ad hoc*, as needed, from the superior courts of Quebec to ensure a majority of judges trained in the French Civil Law for non-constitutional cases from Quebec. In a panel of five, three or four could be Civil Law judges, or in a panel of seven, five could be Civil Law judges.

In any event, appropriate regional quotas for the membership of the Supreme Court of Canada might as well be expressed in the Constitution, as they seem to be permanent and necessary features of the structure of the Court. In this respect, though, it is important to remember a point emphasized by the Federal Government in its White Paper of February, 1969, entitled "The Constitution and the People of Canada". They stress that the Court must exercise a truly judicial and not merely an arbitral function.¹⁷ The soundness of this statement deserves a rather full explanation. The judges of the Supreme Court are there to respond as men of learning, moral sensitivity and social knowledge to the legal issues and related social problems of Canada as a federal country. They are not on the Court as representatives or delegates. Rather they are there as highly placed official persons enjoying secure and permanent tenure in office, so that they need respond only to the call of reason and conscience.¹⁸

But, if this is so, why the regional quotas just suggested? The quotas are necessary and proper because Canada is a vast country differing in some critical ways region by region. There are common factors, but there are unique ones too. If we ensure that the judges are drawn from the various regions as indicated, we ensure that there is available within the Court collective experience and background knowledge of all parts of Canada. In judicial conferences and other contacts within the Court membership, the judges are able to inform and educate one another on essential facts and background from their respective parts of Canada.

¹⁷ *Supra*, n. 9 at 42.

¹⁸ See generally on this subject: W. R. Lederman, *The Independence of the Judiciary*, (1956) 34 Can. Bar Rev. 769 and 1139.

This is the vital factor of relevant native judicially-noticed knowledge that, as mentioned earlier, was missing in the judges of the Judicial Committee of the Privy Council. Here then is the rationale of regional quotas for the membership of the Supreme Court of Canada, and to observe the quotas *for this reason* does not turn the Court into an arbitral body of special pleaders or a miniature national parliament. The professional qualifications of the judges and their independence on the basis of secure tenure for life (or until age 75) means that they will behave judicially, and not as special pleaders or delegates, though they are systematically chosen from different parts of Canada. On this footing — the need for judicial notice of conditions in all parts of the country — it becomes obvious that the present Supreme Court of Canada has too few judges from the Atlantic Provinces and the Western Provinces; it has enough from each of Ontario and Quebec.

The Federal Government proposes to leave the membership of the Supreme Court at nine, with the regional quotas presumably remaining as they are. It also proposes to change the method of appointment so as to give the Provinces a share in the process of selecting Supreme Court judges. In the White Paper previously mentioned, this proposal is put as follows:¹⁹

In considering the manner of selection of the members of the Court, the Government of Canada has been concerned that this body must exercise a judicial, not an arbitral, function. Judges should not be regarded as representatives of several different governments which could conceivably be allowed to appoint them. For this reason, a single system of appointment is to be preferred. It is recognized, however, that to ensure continued confidence in the Court it would be preferable that there be some form of participation on behalf of the provinces in the appointing process. It is therefore proposed that nominations of potential appointees be submitted by the federal government to the Senate for approval. If the proposals for the revision of the Senate are adopted, provincial viewpoints could be effectively expressed by this means. This system would not, of course, apply to those who were already members of the Court at such time as it might be reconstituted under the Constitution and with a new system of appointment.

The merit of this proposal, if any, depends entirely on what Senate reform would amount to, and that remains very obscure. Unfortunately the Canadian Senate has been and is the least successful of our governmental bodies. The main difficulty is that the Senators are appointed for life (or until age 75) by the Government of the day, and Governments have invariably used these appointments to reward faithful adherents of

¹⁹ *Supra*, n. 9 at 42.

their own political party. The result has been a mediocre second chamber for the Federal Parliament that enjoys a poor reputation in the country, and on the whole it deserves this reputation, in spite of the best efforts of a small minority of able and dedicated Senators who, from time to time, do useful things. The only change the Federal Government is presently proposing for the Canadian Senate is to arrange that the Provincial Governments should appoint some of the Senators.²⁰ This could well mean that the new Senate would be more partisan and mediocre than is the present Senate. The necessity for ratification of judicial appointments by such a Senate could discourage good prospective candidates, even among adherents of the party in power, from coming forward.

This idea of Senate ratification seems to have been borrowed from the United States. There the federal judiciary, including the judges of the Supreme Court of the United States, are appointed by the President for life, subject to ratification by the Senate. The results of this in the United States have been of quite dubious merit, in spite of the fact that the United States Senate is an elected body of great prestige. The problem in the United States, as in Canada, is to seek out and appoint the best qualified persons as judges, regardless of political party affiliation. This may be done through the device of the official, non-partisan *nominating* commission. Partisan *ratification* requirements simply miss the whole point of what needs to be done.

I agree with what was said on this subject by Mr. Glenn R. Winters, Executive Director of the American Judicature Society, speaking in 1966 to the Association of Canadian Law Teachers. He said:²¹

A governor is a political officer, and he gets to be governor by playing the game of politics and winning. The same is true of our national president. It is too much to expect of any human being in that position that he will always be able to resist the pressures of politics and keep his judicial appointments non-political. Statistics confirm what is common knowledge — that all federal judicial appointments are strongly influenced by partisan politics and in too many instances this results in appointments that are poor or mediocre. The highest percentage of appointments from the opposite party by any president has been eight per cent, and it has been as low as one or two percent.

A sincere effort has been made over the past 15 or more years by the American Bar Association to make available the professional opinion of knowledgeable lawyers on the qualifications of candi-

²⁰ *Supra*, n. 9.

²¹ *American Appointments, Proposals and Problems*, (1967) 1 Canadian Legal Studies, 252 at 253-4.

dates and to urge the appointment only of those who meet its standards. A great deal of good has been done on this by a very devoted and dedicated ABA committee, and I think there is no doubt that the federal judiciary today is of substantially higher quality than it would have been if the committee had not been at work. It is not, however, a complete or fully satisfactory answer to the problem, for several reasons. The judgment of the lawyers is not infallible, and their weakness is to place too great a value on legal proficiency, to favor what we speak of as the lawyers' lawyer. The bar committee has never affirmatively submitted names, but has limited itself to passing on names submitted to it, and this is undoubtedly right, for it would be too much power to put in the hands of a non-governmental agency if the bar were given the job of nominating the judges. In fact, some people feel that the present situation is going too far, in which a small, widely scattered committee which mostly depends upon the word of one of its members, has for most of the time and would like to have for all the time a virtual veto power over judicial appointments. Albert Kales' answer to this was the judicial nominating commission — the real heart of the merit plan. I will take just a minute to list briefly the important features of the nominating commission as envisioned by Kales and as actually adopted in a dozen or more of the states:

1. It is a nominating rather than a confirming body, rendering affirmative assistance in going out and finding the right man rather than passively approving or disapproving of names submitted to it.
2. It contains lawyer members, in order that the vitally important viewpoint of the bar may have a voice in evaluating and choosing the nominees.
3. It contains at least one judge, in order that the interests of the bench itself may find appropriate expression.
4. It contains laymen, in order that technical legal qualifications may be kept in proper proportion to the equally or more important considerations of general education, integrity, and sensitivity to human problems.
5. The commission does not itself make the precise and final choice, but only makes a preliminary selection, leaving it to the governor or other appointing authority to make the final selection.
6. The governor is required to appoint from the commission's nominations, and may not accept them when they please him and disregard them when he feels like it.
7. In the membership of the commission, politics is minimized by making it either non-partisan or bi-partisan, and its nominations are non-partisan, with an effort to draw on the judicial talent of both parties.

It is desirable to learn from American experience and to adopt their procedures if and when they are better than our own. The American Senatorial ratification procedure has nothing to offer us by way of improvement, whereas the device of the judicial nominating commission has.

As applied to the Supreme Court of Canada, such commissions could improve the quality of judicial appointments and at the same time give the Provinces an effective part in the choice of judges. For instance, there might be a judicial nominating commission for each of the four Supreme Court quota regions mentioned earlier. Such a commission could be composed of both *ex officio* and appointed members, including ministers and senior officials of both the Federal and Provincial Governments, as well as the official provincial law societies, the judiciary and the lay public. Appointments of judges would still be made by the Governor General in Council (the Federal Government), but it would be mandatory for the appointees to be selected only from those persons listed as eligible by the appropriate judicial nominating commission. In these commissions, political party loyalties would be varied and would tend to cancel out, and some members would be genuinely non-partisan in this sense anyway. Such a commission would have no other rational way of proceeding except to seek to identify the persons in the region best qualified on the merits for high judicial office. This would continue the single system of appointment to the Supreme Court which the Federal Government is very properly concerned to preserve, but would at the same time give the Provinces an effective voice in the choice of the judges *and promote high quality appointments*. This is the way to improvement, both from the point of view of federalism and the quality of the judiciary. The sooner the proposals for ratification of judicial appointments by the Canadian Senate are completely abandoned and rejected, the better. They are both unwise and unfortunate.

This, however, is the only important respect in which I take strong exception to the Federal Government's proposals for reform concerning the Supreme Court of Canada. On the other points yet to be mentioned, the status of the court and its jurisdiction, I agree with the Federal proposals.

As to the status of the Court, the Federal proposals are in the following terms:²²

The first question that naturally arises relates to the means for providing the structure of the Court. At present the Constitution makes no provision for a Supreme Court other than to give to Parliament a power to establish one and to define its jurisdiction. The structure and jurisdiction of the Court are therefore provided by legislative act of the central government. The Government of Canada feels that it would now be more appropriate that the Constitution itself provide for the existence, the appointment and tenure of judges, and the major powers of the Supreme Court. This would be more consistent with the Court's role as the final interpreter of the Constitution of a federal state.

²² *Supra*, n. 9 at 40.

While it is now desirable to express the essential provisions concerning the structure and powers of the Supreme Court of Canada as superior constitutional law, it must be remembered that this would be a change in form and not in substance. The Supreme Court of Canada is truly independent now and always has been. Nevertheless, special entrenchment of its essential structure and powers in the Constitution would give it a better image in the eyes of those who do not understand, or who choose to ignore, the present truth about the substantial independence of the Court. I favour special entrenchment to the extent indicated in the Federal proposals for the sake of proper appearances, not because there is any truth in the allegations that the Supreme Court of Canada is now under undue influence by the Federal Government or Parliament or ever has been.

Finally, there is the problem of the total work-load of the Supreme Court of Canada, which is at present too great. The Federal White Paper deals with the problem of the total work-load only indirectly. It states:²³

If provision is to be made in the Constitution for the Court, it would also be necessary to consider how far its jurisdiction should be defined by that document. It is typical of several federal states that their final appellate tribunal has certain powers guaranteed to it by the Constitution, and the remainder are provided by enactment of the national legislature. We would propose a similar system for the Supreme Court of Canada. The Constitution could provide that the Court would enjoy ultimate appellate jurisdiction in any proceeding in which a constitutional issue is raised. This would preserve, free from legislative interference, the most essential function of a final court in a federal state — the power to review the validity of legislative or other acts of all governments. With this function preserved by the Constitution, the Court's other appellate and advisory jurisdiction could be defined by Parliament.

Except for federal power-distribution issues, this leaves open and unexamined many questions about what the rules for hearing appeals should actually be. At present a great many non-constitutional cases engage the time of the Supreme Court because they are appeals as of right under a variety of out-dated and illogical rules, rules that favour to an undue extent the hearing of property, commercial or taxation issues involving large sums of money for wealthy litigants who are not willing to accept the results of their days in court at the provincial trial and appeal court levels. The position respecting appeals in criminal cases is not entirely satisfactory either. Professor Peter Russell has recently published an exhaustive and perceptive study of the jurisdiction of the

²³ *Supra*, n. 9 at 42.

Supreme Court which makes these and other points in very telling fashion.²⁴ He has illuminated an area for reform of the Supreme Court of Canada that has been hitherto much neglected. His main conclusion about the past is given in the following passage.²⁵

Finally, the most fundamental question of policy raised by both appeals as of right and appeals with leave is whether the present system represents the most appropriate mixture of the two modes of appeal. It is extremely difficult to discover any reasonable basis for the provisions which now give the litigant a right to appeal from the provincial appeal courts. The most striking result of the present system is that, in marked contrast to the highest courts of both Great Britain and the United States, the Supreme Court of Canada has relatively little control over its own docket: in its first fifteen years as Canada's ultimate court of appeals, [i.e. since 1949], fewer than one out of five of its reported decisions were in cases that the Court itself selected for review. Under this system the Court still functions in the main as a court of last resort for disgruntled but well-heeled litigants.

Professor Russell recommends that most appeals reaching the Supreme Court of Canada should do so because a reasonable quorum of Supreme Court judges have given leave to appeal on the footing that a preliminary examination by them of the case shows that an issue of national importance is involved, an issue that has not been or cannot be satisfactorily settled in the lower courts. Where federal power-distribution issues are involved, as identified by the Supreme Court itself, the presumption would certainly be in favour of leave to appeal and perhaps the appeal would be a matter of right.

Professor Russell would be stricter in excluding appeals on non-constitutional issues arising under provincial laws than I would. The point made early in this essay about the all-pervasive nature of constitutional issues has real force also in non-constitutional cases. Federal and provincial laws interact and interpenetrate in many and complex ways within a single province. To take a simple example, a mortgage transaction involves provincial land law, but the federal laws governing interest and bills of exchange are also involved. The complete judicial settlement of a disputed mortgage transaction may require decisions on several points, some arising under provincial laws and some under federal laws. Moreover, this interaction and interpenetration is growing as the Federal Parliament and the Provincial Legislatures pass more and more statutes to meet modern social problems like consumer protection, pollution

²⁴ Peter H. Russell, *The Jurisdiction of The Supreme Court of Canada: Present Policies and a Programme for Reform*, (1968) 6 Osgoode L.J. 1-38.

²⁵ *Supra*, n. 24 at 28.

control and urban renewal. The point is valid for the areas of both private and public law. Because the Canadian Constitution provides us with a single system of courts with this comprehensive jurisdiction, it is much superior in this respect to the Constitution of the United States, with its separate systems of State and Federal courts. Canadians are thus saved the wasteful 'forum-shopping' that goes on in the United States between their two court systems.

At the apex of the single Canadian System is the Supreme Court of Canada. Obviously its jurisdiction should be as comprehensive respecting federal and provincial laws as is that of the lower courts, subject to the screening of cases for their national importance as indicated. Speaking of power-distribution cases in the Supreme Court, the Government of Canada has said:²⁶ ". . . a body of integral jurisdiction would be more in keeping with our traditions and with a sound appreciation of how our law works in practice. Artificial divisions in the interpretative process would not assist in the sound development of constitutional law". I agree and would generalize the argument to include non-constitutional cases in our federal country as well.²⁷

²⁶ *Supra*, n. 9 at 40.

²⁷ *Supra*, n. 15.

Second Chambers in Federal Political Systems *

R. L. Watts

The Issue of Senate Reform in Canada

Since Confederation, the role of the Senate has been a recurring political problem in Canada. Even during the negotiations leading to Confederation, the issue was considered of major importance. At the Quebec Conference, for example, almost six entire days of the fourteen days of discussions were devoted to this particular topic.¹ The resulting Confederation agreement was a delicate settlement designed to balance centripetal and centrifugal tendencies among the signing parties. It was fashioned also to dispel the apprehensions of the Maritime provinces and Quebec that their influence in the new federation would decline with the growth of the country's population. As eventually constituted, the Senate was intended to be an essential instrument in achieving these objectives.

Despite the careful planning that preceded its creation, however, within a decade of Confederation proposals were put forward in Parliament for reform of the Senate. The question of reform or abolition has been raised repeatedly ever since, especially when, after a change of government, some cherished legislation has been blocked or emasculated by an Opposition majority in the Senate. But in the past extensive structural changes to the Senate have faced two difficulties. First, any major alteration was likely to arouse opposition from the Maritime

* I wish to acknowledge the assistance of Agar Adamson of the Department of Political Science, Acadia University, who gathered some of the material for this paper.

¹ R. A. MacKay, *The Unreformed Senate of Canada*, Revised ed., McClelland and Stewart Limited, Toronto, 1963, pp. 36-50. See also Donald Creighton, *John A. Macdonald, The Young Politician*, Macmillan Co. of Canada, Toronto, 1952, p. 376, and *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Hunter & Rose, Quebec, 1865, p. 88.

provinces, hostile to a reduction of their generous representation in the Senate, and from Quebec, traditionally suspicious of constitutional innovation. Second, a lack of general agreement on the type of Senate desired has divided the proponents of reform. Consequently, the extent of reform undertaken by previous prime ministers usually has been the appointment of their own party supporters as senators in order to redress the party balance. The issue of reform or abolition therefore has remained unresolved.

Recent studies have suggested that changes in procedure and practice have made the Senate a less partisan and a more useful and effective legislative chamber.² Senators have performed a creditable service in checking (although intermittently) questionable legislation, in revising and amending bills to improve the technical quality of legislation, in introducing private bills, in serving on committees of investigation, and in contributing to the discussion of important and contentious policies through occasional debates and inquiries on broad public issues. Thus, in practice the Canadian Senate has been a useful supplement to the House of Commons, especially as the weight of parliamentary business has grown. And yet, the Senate still does not command the public respect which would give to its debates, reports, and legislative action the moral authority necessary for the exercise of an influential role in Canadian politics.

The appointing method seems to be a major factor contributing to this weakness of the Senate. The system of appointment combined with lengthy tenure has had two effects. First, it has prevented the Senate from establishing a reputation as the protector of the rights and interests of the provinces and of minorities. It is true that many of the Fathers of Confederation did not look upon the Senate as the only, or even the main, guardian of provincial or sectional interests; but it appears to have been even less effective in performing this function than most of them expected.³ In the desire to give senators independence from the shifting and fluctuating passions of popular feeling and to perpetuate monarchical traditions, the designers of Confederation chose the system of nomination and life tenure. But by providing for the appointment of senators by the central government they undermined, even more effectively than the centralists among them perhaps intended, any tendency for senators

² See, for example, R. A. MacKay, *op. cit.*, esp. pp. vii, and 166; and F. A. Kunz, *The Modern Senate of Canada, 1925-1963, A Re-Appraisal*, University of Toronto Press, Toronto, 1965.

³ On the intentions of the Fathers of Confederation and the actual record of the Senate as a guardian of provincial and minority rights, see R. A. MacKay, *op. cit.*, pp. 36-50 and 112-128.

to promote energetically the interests of their provinces. Thus, however keenly some senators might cherish the interests of their own localities, because they have not been compelled to account to their provinces or regions the Senate has not established itself as a champion of provincial rights or sectional interests. The Senate occasionally has protected the provinces; but more often it has supported the interests of the central government, usually acquiescing to the interests of the majority party in the Senate. The provinces and minorities therefore, have had to rely upon the ballot box and upon representation in the Cabinet as the major safeguards of their interests, rather than upon the Senate.

Second, in an age which emphasizes the primacy of democratic principles and no longer accepts the nineteenth century notion, espoused by many of the Fathers of Confederation, that propertied interests should be protected within the political system from the passions and power of the masses, the method of appointment combined with the extended tenure of senators has robbed the Senate of the aura of legitimacy required for it to be politically influential. Members of the House of Commons can always claim to speak for their electors. Senators, on the other hand, have no grounds for claiming to speak for others than themselves, unless it be for the party or party leader who has appointed them. Because governments have been unable to resist the temptation to nominate their own supporters, the stigma of partisanship has prevented senators from winning public respect and support. The prevailing public attitude towards the Senate is one of either ridicule or indifference; and no institution which invokes such a response can be politically influential.

The Senate's lack of political prestige combined with its failure to serve a distinctively "federal" role explains the recurrent demands that it be reformed or abolished. But the issue needs to be set in a wider context and considered in the light of the present strains upon the Canadian federal system. The questions which must be examined are the extent to which the weaknesses of the Senate have contributed to the failure to resolve these stresses within Canada, and what reforms in the Senate might help to make more effective the functioning of the Canadian federal system. Traditionally, second chambers have been recognized as having useful functions even within unitary political systems. A second chamber often has been justified in a unitary system as an institution which, by providing a second opinion, helps a democracy to clarify its thinking.⁴ The importance of this role must not be overlooked, and recent studies of the Canadian Senate suggest that in this respect it has

⁴ See, for instance, K. C. Wheare, *Legislatures*, Oxford University Press, London, 1963, pp. 209-213, and Letter from Lord Bryce to the Prime Minister (reporting findings of the Conference on the Reform of the Second Chamber), April, 1918, Cd. 9038 (London).

been a useful supplement to the House of Commons.⁵ But in most federal systems, there has been an even more fundamental reason for the establishment of a bicameral legislature: it has usually been an essential part of the federal compromise. By serving as a counterpoise to the principle of popular representation, it has been designed to allay the anxieties of the smaller provinces and the distinctive minorities that their interests would suffer at the hands of a permanent majority. That this was one of the intended functions of the Canadian Senate is clear, for the principle of sectional equality in the Senate was basic to the Confederation agreement.⁶ But it is equally clear that in performing this role the Senate has been almost totally ineffective. This helps to explain why many French Canadians have come to question its utility and why such radical schemes for Senate reform as that of Jacques-Yvan Morin have been advanced.⁷

The focus of this paper, therefore, will be upon the role which second chambers have played within other federal systems, in order to see what lessons, if any, may be gleaned for Canada from their experience.

Relevance of Experience in Other Federal Systems

It may be argued with some cogency that because Canadian problems are unique, the experience of other federations has little relevance to them. But although any reference to experience in other federations will certainly have to allow for the special features of the Canadian situation, useful lessons may be learnt from their attempts to cope with similar problems.

Among the federal systems of special interest are the United States, Switzerland, and Australia. These three federations, compared with most contemporary political systems, have displayed a high degree of constitutional stability. The American federal system has been in operation for nearly two centuries, the Swiss for not quite a century and a quarter, and the Australian for two-thirds of a century.

The American and Swiss federations both illustrate the way in which a relatively strong second chamber may operate in a system where the executive branch of central government is not dependent upon the first chamber for the length of its term of office. Thus they provide a useful contrast to the second chamber in a parliamentary federation such

⁵ R. A. MacKay, *op. cit.*, and F. A. Kunz, *op. cit.*

⁶ See, for instance, *Confederation Debates*, *op. cit.*, p. 88 (George Brown).

⁷ Jacques-Yvan Morin, "Un nouveau rôle pour un Sénat moribund", *Cité libre*, Vol. XV, juin-juillet, 1964; and also "Vers un nouvel équilibre constitutionnel au Canada" in P.-A. Crépeau and C. B. Macpherson (eds.), *The Future of Canadian Federalism*, University of Toronto Press, Toronto, 1965, pp. 141-156, esp. 148-153.

as Canada. The Swiss federation is also of special interest because of its multi-lingual and multi-cultural character. One of the strongest continuing motives for the federal nature of its political institutions has been the existence of German, French, and Italian-speaking groups concentrated in different cantons. The situation is further complicated by the dominance of either Roman Catholics or Protestants in different cantons. The design of the Swiss second chamber reflects this situation. The apparent stability of Swiss political institutions may tempt us into thinking that they are merely a rational expression of an already existing national consensus. But it must be remembered that the basic framework of the present federal system was worked out in 1848 to overcome the tensions which in that year had erupted in a brief civil war.⁸

The Australian federal system has not had to cope with the problems of multi-lingualism or multi-culturalism experienced by Canada and Switzerland. But like Canada, and unlike the United States and Switzerland, Australia has adopted a parliamentary Cabinet form of government, which has affected the role played by the second chamber. This country thus provides a useful example of an attempt to combine a directly elected Senate (comparable to the American Senate) with a parliamentary Cabinet continuously responsible to the lower house.

Of the federations created since 1945, the experiments in the new federations of the Commonwealth — India, Pakistan, Malaya (later Malaysia), Nigeria, the West Indies, and Rhodesia and Nyasaland — are of interest because each of them has had, at least for a time, two features in common with the Canadian federal system. First, at some stage in its federal development each has attempted to combine the institutions of parliamentary Cabinet government with a federal political system. The effect of this combination has been to limit the role which the second chamber might play, and in the case of two of these federations, Pakistan and Rhodesia and Nyasaland, it even led to dispensing with a second chamber. In some of these federations, too, the failure of the parliamentary institutions to provide governmental stability and to generate a federal consensus has resulted in the subsequent adoption, instead, of a non-parliamentary executive closer to the American model (as in Pakistan) or has been blamed for the disintegration of the federation (as in the West Indies and Nigeria). The experience of these new federations, therefore, may raise for Canadian consideration the question of whether the parliamentary form of executive, together with the limits it inevitably places upon the second chamber, meets the need for central institutions which will induce federal cohesion.

⁸ The 1848 constitution was revised in 1874, but the new constitution made few changes to the basic federal framework.

The newer Commonwealth federations are of particular relevance for a second reason. Most of them, like Canada, adopted a federal political solution specifically to meet the needs of a society with sharp linguistic or cultural diversities. India, for example, has been attempting since 1947 to unite by means of a federal system ten linguistic groups, each of which is at least as large as the French-speaking population of Canada and each of which speaks a language as distinctive from the others as French is from English. Thus, in spite of a constitution which in strictly legal terms has many unitary features, the Indian political system, particularly since the reorganization of states on linguistic lines in the mid-1950's, has in practice operated in an essentially federal manner.⁹ In Pakistan the cleavage between the West Pakistanis, speaking a variety of languages related to Urdu and largely Middle-Eastern in their cultural outlook, and the East Pakistanis, speaking Bengali and Southeast Asian in character, has been further accentuated by their geographical isolation from each other in two provincial units 1,000 miles apart. In such a situation, President Ayub Khan, despite his expressed preferences for a unitary regime, found it necessary to promulgate a constitution in 1962 which re-established "a form of federation".¹⁰ The rejection of a unitary system in favour of a federal one in Malaya in 1948 was a direct outcome of racial antagonism between the Malays and Chinese; and the dominant political factor in the wider Federation of Malaysia created in 1963 has been the communal tension between the Malay, Chinese, Indian and indigenous Bornean communities. The Federation of Rhodesia and Nyasaland for a decade attempted to reconcile the interests of determined white and black nationalisms in a federal "partnership". This attempt failed because the "more advanced" European settlers insisted upon the role of senior and controlling partner. Nigeria, marked by great linguistic and cultural diversity, was a federation in which the rise of political parties based primarily on ethnic consciousness fostered such intense regional hostility and separatism that ultimately the fragile cohesion which had enabled the federation to survive from crisis to crisis for a decade collapsed. Of the newer Commonwealth federations, only the West Indies attempted to unite territories which were culturally relatively homogene-

⁹ For examples of this assessment, see R. L. Watts, *New Federations: Experiments in the Commonwealth*, Clarendon Press, Oxford, 1966, pp. 355-356; W. H. Morris-Jones, *The Government and Politics of India*, Hutchinson & Co., London, 1964, pp. 141-144; N. D. Palmer, *The Indian Political System*, Houghton Mifflin Company, Boston, 1961, pp. 94-98; K. Santhanam, *Union-State Relations in India*, Asia Publishing House, Bombay, 1960, pp. 7-13; D. D. Basu, *Commentary on the Constitution of India*, 3rd ed., S. C. Sarkar & Sons Private Ltd., Calcutta, 1955, pp. 12-18.

¹⁰ Constitution, 1962, preamble.

ous; but here the strength of insular consciousness and the exploitation of it by political parties proved a barrier to federal unity.

One other postwar federation is of particular interest in any study of federal second chambers. The West German federal system is somewhat more centralized than the Canadian, because the social and political diversity is less deep-rooted than in Canada; but the Germans have in the Bundesrat a second chamber with some unique features. Within a parliamentary federal system, there has been established a second chamber which not only represents the interests of the component states far more effectively than does the Canadian Senate, but which also serves as a kind of standing federal-provincial conference. At least one Canadian political scientist has suggested that in reforming the Senate we would do well to follow the West German example.¹¹

These, then, are the federations upon whose experience I shall draw in considering the role of second chambers in federal political systems. Other countries, such as the U.S.S.R., Yugoslavia, Austria, Brazil, Argentina, Mexico, and South Arabia, have or have had constitutions which have purported to be federal, but their operation has been so different from federalism as it has been known and worked in Canada that it is doubtful that they would shed any useful light on this discussion.

Nature of Federal Political Systems

Before examining the distinctive role of second chambers within federations, we must discuss the nature of federal political systems. Such a preliminary clarification is desirable because the term "federal" often has been used loosely and imprecisely. To most people a federation is a form of political association in which two or more states constitute a union with a common government, but in which the federating states retain a measure of autonomy. But within this broad usage the term "federal" has been given a variety of more specific uses. In one of the oldest meanings of the term, "federation" has been synonymous with "confederacy", referring to the loose linking together by treaty of sovereign states for military, economic or diplomatic reasons, as exemplified by the confederacies of ancient Greece, the Swiss Confederation before 1848, the United States of America before 1787, and the German Empire, 1871-1918. Sometimes, at the other extreme, "federal government" has been used synonymously with decentralized government; the term has been applied in this way to the political systems, at one time or another, of Argentina, Brazil, Mexico, Venezuela, Weimar Germany, the U.S.S.R.,

¹¹ Peyton Lyon, "A New Idea for Senate Reform", *Canadian Commentator*, July-August 1962, pp. 24-25.

Yugoslavia, and the French colonial federations, even though in each the central government exercised overriding authority.

Students of political institutions and of constitutional law have attempted to define the term "federal" more precisely, referring to a form of government midway between these two extremes and quite distinct from confederacies on the one hand and decentralized unitary government on the other. One of the clearest statements of this classification is presented by K. C. Wheare. He defines the federal principle as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent".¹² This form of government is contrasted with a confederacy, in which the central government is subordinate to the regional governments, and with a unitary government, in which the regional governments are subordinate to the central government.

It is from this definition of the federal concept, as involving two coordinate levels of sovereignty within a single country, that the traditional theory of "dual federalism" was developed.¹³ From the notion of dual sets of government — general and regional — existing side by side, each separate in its water-tight compartment and within its own sphere independent of the other, a number of implications about federal political systems have traditionally been taken to follow. If each level of government is independent within its own sphere, then the other governments within the system must be limited to theirs. Each government, therefore, must act directly upon the people and not indirectly through another government. There must be a demarcation of the authority of each level of government; and for clarity and to minimize disputes, this demarcation must be set down in a supreme written constitution. Any amendment to the federal aspects of the constitution must require the approval of both levels of government. To interpret the constitution and

¹² K. C. Wheare, *Federal Government*, 4th ed., Oxford University Press, London, 1963, p. 10. For other similar definitions of the federal principle see W. P. M. Kennedy, *The Constitution of Canada*, Oxford University Press, London, 1922, pp. 407-408; and J. A. Corry, *Democratic Government and Politics*, 2nd ed., University of Toronto Press, Toronto, 1951, pp. 551-553.

¹³ Edward S. Corwin was the first person to use the term "dual federalism" in this way, *The Twilight of the Supreme Court*, Yale University Press, New Haven, Conn., 1934, pp. 47-48. It has been used in this sense elsewhere also in M. J. C. Vile, *The Structure of American Federalism*, Oxford University Press, London, 1961, p. 194; D. Elazar, *The American Partnership*, The University of Chicago Press, Chicago, 1962, Ch. 1; R. L. Watts, *op. cit.*, Chs. 1 and 14. As used here it should not be confused with E. McWhinney's own specific notion of "dualistic federalism", which he applies to a binational federal system based virtually on a double-majority principle (E. McWhinney, *Comparative Federalism: States Rights and National Power*, University of Toronto Press, Toronto, 1962, p. 17, and "Legal Implications of the 'Revolution' in Quebec" in P.-A. Cr  peau and C. B. Macpherson (eds.), *op. cit.*, pp. 160-161.)

umpire conflicts between governments an independent judiciary has normally also been considered necessary.¹⁴

The concept of dual federalism has the advantage of clarity. It also seems to provide a simple political solution for dealing with the problems of a society beset with linguistic or cultural cleavages. With two coordinate levels of government, each independent of the other and confined to its own sphere, each linguistic group might be left free within its own province or provinces to deal with matters of linguistic or cultural significance, without interference from the central government; and at the same time each group could obtain the military, diplomatic, and economic benefits of common action placed under the responsibility of the central government. Indeed, it appears that the Canadian Confederation settlement embodied such a rationale. The distribution of legislative authority seems to have been based on the premise that matters of cultural contention between the two linguistic communities should be removed from the jurisdiction of the common authorities, but military defence and economic integration and expansion could be placed in the hands of the central authorities as subjects isolated from cultural controversy.

This conception of dual federalism, however, has a fatal flaw. As Wheare himself has had to concede, in practice the isolation from each other of the activities of the two levels of government has simply proved impracticable.¹⁵ In such federations as the United States, Switzerland, and Australia, as well as in Canada, the development of communications, the extension of federation-wide commerce, the development of an interdependent economy, and the growth of a sentiment of interregional community, have necessitated extensive administrative consultation and cooperation between governments and at least partial financial dependence of state and provincial governments upon central governments. This has occurred especially in periods of war and economic crisis. Moreover, as the sphere of governmental economic activity and control has expanded, the isolation of economic and cultural issues has become impossible. In this setting the notion of dual federalism has proved clearly an inapplicable myth. In the words of one Canadian political scientist, "Under the heat and pressure generated by social and economic change in the twentieth century, the distinct strata of the older federalism have begun to melt and flow into one another."¹⁶ The "layer cake" notion

¹⁴ Proponents of this view have often failed to notice that in Switzerland a large segment of this umpiring function has been assigned to the referendum process rather than to the judiciary. In Switzerland the Federal Tribunal may declare cantonal laws invalid, but it cannot invalidate central laws. Only by referendum invoked upon the demand of 30,000 citizens of eight cantons can central laws be invalidated.

¹⁵ K. C. Wheare, *Federal Government*, *op. cit.*, pp. 242-243.

¹⁶ J. A. Corry, "Constitutional Trends and Federalism", in A. R. M. Lower and others, *Evolving Canadian Federalism*, Duke University Press, Durham, N.C., 1958, p. 122.

of federalism has had to be replaced by that of the "marble cake". Interdependence and cooperation among the governments thus has become a characteristic feature of all contemporary federations, including Canada. As another political scientist speaking of the current situation in Canada has put it, "There is no conceivable division of resources and responsibilities which would make the two levels other than highly interdependent."¹⁷

This trend was first recognized in the 1930's by American scholars, who referred to it as "cooperative federalism".¹⁸ It should be noted that the term, as used by these scholars, referred not only to the development of interaction and cooperation between the two levels of government, but also to the trend towards greater centralization because of the increasing financial dependence of state or provincial governments upon central governments, as exemplified by conditional grants and joint-cost programs. More recently, Canadian politicians have used the term "co-operative federalism" with a different emphasis to refer to the devolution of greater responsibilities to the provinces — although implicit in this decentralization is the requirement of intergovernmental consultation and cooperation if such a devolution is to be effective. Common to both usages is the recognition that — whatever the degree of centralization or decentralization — in contemporary economic and social conditions the two levels of government within a federal system cannot avoid a large measure of interdependence.

Within the last decade students of American federalism have gone even further in their attack upon the concept of dual federalism. Recent writers, such as M. J. C. Vile and D. J. Elazar, have suggested that the interdependence of governments in the American federal system is not a development of the twentieth century but was in fact an essential feature of American federalism from the beginning.¹⁹ Elazar, for example, has shown that throughout the history of the United States there has been extensive administrative cooperation and political interaction between federal and state governments, despite legal pronouncements enunciating the principle of dual federalism. Interdependence between governments is not something new, then, but simply a characteristic of American federalism which has been accentuated by the economic and social conditions of the twentieth century.

This concept of interdependent federalism parts company with the notion of dual federalism on two fundamental points. First, it finds fault

¹⁷ D. V. Smiley, *The Canadian Political Nationality*, Methuen, Toronto, 1967, p. 100.

¹⁸ See, for instance, Jane Perry Clark, *The Rise of a New Federalism*, New York, 1938, and "A Symposium on Co-operative Federalism", *Iowa Law Review*, Vol. XXIII, 1938, pp. 455-616.

¹⁹ M. J. C. Vile, *op. cit.*, Ch. 10; D. J. Elazar, *op. cit.*, Ch. 1.

with the traditional definition as being too legalistic. Because those who accepted the concept of dual federalism focused their attention on the constitutional structure and especially the legal division of authority, on the pronouncements of the courts on this division, and on the formal amendments to the constitution altering this division, they tended to pay insufficient attention to the administrative and political interpenetration of the two levels of government. Thus, they failed to recognize the importance within a federal system of the administrative arrangements which inevitably required intergovernmental cooperation, of the political attitudes of citizens affecting the adoption of policies at both levels of government, and of the role of political parties bridging the two tiers of political activity.

Second, the proponents of the concept of interdependent federalism suggest that the principle of dual federalism was based upon a premise which was logically unsound. It was assumed that if one government were dependent on another, the former necessarily would be subordinate. In order for neither level of government to be subordinate, therefore, each must be independent of the other in its own sphere. This presupposition is valid enough as long as the dependence of one government upon another is one-sided. But there is another possibility. Suppose that both levels of government were equally dependent upon each other — that is, interdependent. In such a situation dependence need not necessarily imply that one is subordinate to the other. Thus, independence is not the only alternative to subordination of one level of government; another is mutual dependence or interdependence. Indeed, this is the contemporary situation found in most federations. Provincial and state governments have become increasingly dependent upon central governments for their finances, but central governments have had to rely more and more upon the administrative cooperation of state and provincial governments for the implementation of federation-wide policies. The activities of central governments have expanded dramatically, but so also have those of provincial and state governments.²⁰ Thus, although the theories of dual federalism and interdependent federalism are derived from the same fundamental idea (that a federal system is characterized by central and provincial governments which are coordinate, in the sense that neither is subordinate to the other), dual federalism views the two sets of government primarily as equal rivals to be kept as far as possible from interfering with each other, while interdependent federalism views them primarily as equal partners with distinct interests but interacting with each other.

²⁰ This has been a trend not only in Canada, but also, for example, in the United States. See M. J. C. Vile, *op. cit.*, pp. 4-16.

The concept of interdependent federalism is useful in that it gives us a wider perspective for viewing the second chamber as one of a number of interacting elements within a single political system which embraces both levels of government. The notions of dual federalism and co-operative federalism tend to encourage one-sided accounts of the operation of federal systems. Dual federalism, by directing attention at the self-contained operation of each tier of government, may lead us to neglect the many points of political, administrative, and legal contact and interpenetration between these governments. Moreover, by focusing upon the federal second chamber as belonging strictly to one level of government, it may also lead us to overlook the extent to which the second chamber might serve as a political bridge between the two levels. The notion of cooperative federalism, by emphasizing the cooperative administrative interaction between levels of government, tends to underestimate the degree to which these governments may also rival each other. It draws attention away from the importance within a federal system of political conflict and of the processes by which a consensus from among conflicting regional groups is arrived at with the help of such institutions as the second chamber.

Considered in this light, there are three aspects to the working of a federal system which are fundamental to its ability to accommodate the concurrent demands for both unity and diversity within a single political system. First, because the various groups cannot agree to be partners over the whole range of political action, a federal system involves a compromise. Those functions over which a general consensus can be reached are assigned to the central government, while other functions over which the partners "agree to differ" are left as the responsibility of the provincial governments. Thus, the distribution of functions and responsibilities between the levels of government is one fundamental aspect of any federal system.²¹ Second, since in practice the functions assigned to the two levels of government cannot be totally isolated from each other, the activities of the two levels of government interpenetrate both administratively and politically. Intergovernmental relations, therefore, are a second fundamental aspect of any federal system.²² Third, since a federal system represents a form of partnership, an especially crucial aspect is the process through which the diverse sectional or cultural groups participate in reaching a federation-wide consensus. It is as an institution contributing to this process that a federal second chamber performs its prime function. Unless the machinery for arriving at central policies and decisions ensures the distinctive sectional and cultural minorities effective participation in

²¹ This is the aspect which dual federalism emphasizes.

²² This is the aspect which cooperative federalism emphasizes.

the process, a minimum consensus is unlikely to be achieved and the partnership is likely to dissolve in the face of an increasingly hostile struggle between a permanent majority and an embittered minority. Seen in this light, the role of the second chamber in a federal system is not merely the negative function of protecting the interests of sectional and cultural minorities from the permanent majority, but the positive one of resolving conflicts of interest and of widening the area and extent of agreement and accommodation between them.

Pluralist and Parliamentary Federal Systems

While every federal system has required machinery to produce agreement on common policies, federations have varied radically in the character of the structures which they have created to perform this function. In this respect federations may be classified by their institutional form into two types: the pluralist federations, exemplified by the United States and Switzerland; and the parliamentary federations, exemplified by Canada, the other Commonwealth federations, and Germany. This distinction has a fundamental bearing upon the role and impact which a second chamber may have within a federal system.

The basic axiom of the pluralist federations has been the notion that political authority should be dispersed among multiple centres of power: not simply between central and state institutions, but also among a variety of central institutions. In the past many writers failing to look at the United States as a single interdependent political system have focused either upon the "federal" division of authority between the central and state governments, or upon the "separation of powers" within the central government. But the two are interrelated and derived from the same fundamental axiom which permeates the theory and practice of American pluralist federalism — namely, that instead of a single centre of sovereign power there must be multiple centres of power, none of which is or can be wholly sovereign.²³ Robert Dahl has suggested that the fundamental pluralism of the American political system rests upon three basic postulates:

- 1) Because one centre of power is set against another, power itself will be tamed, civilized, controlled, and limited to decent purposes, while coercion, the most evil form of power, will be reduced to a minimum.
- 2) Because even minorities are provided with opportunities to

²³ The essentially pluralist basis of American federalism is one of the insights which both Vile and Elazar arrive at from their analysis of it as a single interdependent system.

veto solutions they strongly object to, the consent of all will be won in the long run.

- 3) Because constant negotiations among different centres of power are necessary to make decisions, citizens and leaders will perfect the precious art of dealing peacefully with their conflicts, and not merely to the benefit of one partisan but to the mutual benefit of all the parties to a conflict.²⁴

Thus, in order to tame power, to secure the consent of all, and to settle conflicts peacefully, a federal system was created in the United States in which authoritative decision-making was dispersed among the states, the House of Representatives, the Senate, the president, and the Supreme Court. These various institutions have been assigned powers so that they check and balance each other in such a way that a majority or consensus cannot emerge without compromises which take into account minority views.

Although differing in many respects of detail, the Swiss federal system has been based on the same fundamental principle of dispersed but interacting multiple centres of power. Not only is authority divided between the central and cantonal legislatures; but the two central legislative chambers have independently equal authority, the members of the federal executive are excluded from membership in either chamber and — having fixed terms of tenure — are not dependent upon either for finishing out their terms of office, and the citizenry itself has an important role through the procedures of initiative and referendum. At the same time these plural centres of political power interact to balance and check each other in such a way as to facilitate the resolution of conflicts and the emergence of a widely accepted consensus. For example, although the executive has a fixed term and is separated from the legislature, its members are elected by the two legislative houses in joint session; the federal second chamber participates on an equal footing with the popular chamber, and yet its membership is controlled by the cantons; legislative functions are divided between the central and cantonal governments, but the membership of the federal second chamber includes many who are also members of a cantonal legislature or executive; the constitutional validity of cantonal laws is reviewed by a Federal Tribunal appointed by the Federal Assembly, but the validity of central legislation is determined by a referendum procedure.

In retrospect both federations have been remarkably successful in resolving internal conflicts. On those occasions when conflicts have

²⁴ R. A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent*, Rand McNally & Company, Chicago, 1967, p. 24.

become serious, the checks within these systems against the exercise of excessive power by one or a combination of elements have operated so that a period of delay and discussion has usually followed, at the end of which a compromise solution has emerged. The American Civil War represented an important exception, but perhaps even more significant is the fact that this has been the only major breakdown in almost two centuries of continuous development in operating a democratic system "in which unity yields to diversity and diversity to unity".²⁵ The Swiss federal system, created in 1848 after the previous confederacy had terminated in civil war, has become renowned for the manner in which it has reconciled unity with religious and linguistic diversity. It is true that both federations have had to pay the price which the diffusion of authority among multiple centres of power entails: decision-making has often been protracted and urgent action has been difficult. But the relative success of the American and Swiss federal systems is illustrated by the fact that they are two of the oldest constitutional systems in operation anywhere in the world today.

Federal government in the form adopted in the United States and Switzerland contrasts sharply with unitary government, particularly as practised in Britain where sovereignty is concentrated not only in the central institutions but also within the central government in a parliamentary Cabinet. Influenced by British as well as American precedents, the Commonwealth federations, with Canada as the prototype, have attempted to combine features of both systems in a hybrid form of government. In so doing they have made a radical departure from the theory and practice of American and Swiss federalism. The institutional framework and processes used in these two federations to generate a federal consensus out of diversity and to guarantee sectional or cultural minorities effective participation in this process were abandoned.²⁶ Instead within each level of government a set of institutions was established in which authority and decision-making were concentrated completely in a parliamentary cabinet. Thus, where in the American and Swiss federations a fundamental feature of the system is the "dispersal" of authoritative decision-making among a wide range of institutions, in Canada and the subsequent federations decision-making has been "divided" between concentrations of power in the central and provincial parliamentary governments. Thus the Commonwealth federations in their institutional structure have actually come closer to the principle of dual federalism as

²⁵ *Ibid.*, p. 4.

²⁶ Canadians, the first to abandon the American example, were strongly influenced in their decision, of course, by the immediacy of the American Civil War at the time of Canadian Confederation.

defined earlier.²⁷ It should be noted, however, that even in these federations it has been impossible in practice to isolate the activities of the two levels of government; but the relation of interdependence within these systems has been between two sets of government within which authority is concentrated rather than among a variety of centres of dispersed authority. J. A. Corry recognized this difference when he noted that the separation of powers within both national and state institutions in the United States enabled administrators at both levels, shielded from the more niggling reservations of politicians, to formulate and operate cooperative schemes, while in Canada and Australia, with an integrated command of administration under a prime minister and a cabinet responsible to the legislature, officials had to be far more cautious about taking significant positions in matters as political as federal-provincial relations.²⁸ Thus, the hybrid of parliamentary and federal institutions has produced a style of political interaction radically different, and in so doing has affected the role and impact which a second chamber might play within such a system.

The concentration of central power in a cabinet continuously responsible to a majority in the popularly elected legislative chamber has restricted the role which the second chamber might play in effectively influencing central policies on behalf of provincial or minority interests. Indeed, it has meant that in the parliamentary federations the major responsibility for performing this function has fallen upon the political party or parties constituting the majority in the popular house, rather than upon the interaction of different central institutions, including the second chamber, checking and balancing each other. The parliamentary form of federal government has had the advantage that within each level of government the concentration of authority has enabled more rapid and more coherent policy-making and has avoided some of the deadlocks and delays which have characterized systems based on the separation of powers. In central politics, however, it has also made sectional and minority interests far more vulnerable to a permanent majority with any solidarity. The record of parliamentary federations suggests that their stability has been directly related to the degree to which the parties obtaining parliamentary majorities have accommodated the interests of the major sectional or cultural minorities. Where the sectional or cultural groups have been sufficiently balanced in their electoral strength (as in Australia,

²⁷ It is perhaps significant that it has been writers immersed in the parliamentary tradition, such as Dicey and Wheare, who have been prominent among the formulators of the theory of dual federalism referred to earlier. See, for example, K. C. Wheare, *Federal Government*, *op. cit.*, p. 14, footnote 2, where he lists those who substantially agree with his definition.

²⁸ J. A. Corry, *op. cit.*, pp. 122-123.

India, and Malaysia), the political parties generally have been induced to make compromises and concessions to minorities in order to achieve an electoral majority. But where a federal system attempted to unite groups varying widely in size (as in Pakistan during its first decade, Nigeria, the West Indies, and Rhodesia and Nyasaland), the political parties, without an institutional framework to channel them in the direction of compromise, became instead the champions either of an insistent permanent majority or of a beleaguered minority. The effect was to destroy the small consensus that had existed among the diverse sectional groups, and to lead in the end to the collapse of each of these federal systems.

The Bicameral Compromise

Because control of the central legislature is a major element in the control of central power, the organization of the central legislature has proved a contentious issue during the creation of every federation. The controversy usually has turned on two major issues: the regional composition of the central legislature, and the method of selecting its members. The reason for debates over regional composition lies in the wide disparities of population, area, and wealth among the federating units which have existed in every federation. As a rule, the smaller provinces have feared that in central politics their voices would go unheard if representation were based solely on population, because the few populous regions would be in a position of perpetual predominance. Consequently, the smaller regions invariably have opposed sole reliance on the principle of representation according to population, and have proposed some weighting favouring smaller provinces or even equality of provincial representation in the central legislature, often making this a condition of entry into the federation. The larger provincial units, on the other hand, usually have resisted and resented suggestions that they should get less than their fair share, citing not only the democratic principle of representation by population, but often also pointing to the financial support they are called upon to provide for the smaller and poorer provinces.

The second issue provoking controversy has been the method of selection appropriate for the members of the central legislature. Because the control of central power is at stake, it has sometimes been argued that members of the central legislature should be selected by the provincial legislatures, rather than chosen by direct popular election. Such suggestions have arisen in part because of a desire to structure the central legislature in such a way that its members would be disinclined to expand central activities at the expense of the provincial governments, and in part from a desire of the political leaders of the federating provinces to

retain some influence over central politics. These claims have always been met by equally insistent counter-arguments that such an arrangement would be "undemocratic". Strict dual federalists have argued, in addition, that it would be a violation of the federal principle, since it would undermine the independence of the central legislature from the provincial governments.²⁹

In the attempt to resolve the conflicting viewpoints on these two issues, most federations have established a bicameral central legislature as a compromise solution. The four long-standing federations — the United States (1787), Switzerland (1848), Canada (1867), and Australia (1901) — all created second chambers; and most of the post-1945 federations — Germany, India, Malaysia, the West Indies, and Nigeria — found it desirable to do likewise. It is also significant that two of the recent federations, Malaya and Nigeria, actually experimented for a time with unicameral legislatures but in the end added a Senate. Only in the special circumstances of Pakistan and Rhodesia and Nyasaland was the establishment of a central second chamber rejected.³⁰

The appeal of the bicameral solution has lain in the compromises in regional representation and in method of selection that it makes possible. With two legislative houses different principles of composition and appointment can be applied. Thus, in all of the federations with bicameral central legislatures, the members of the first chamber have been directly elected and regional representation has been based on population.³¹ In the central second chambers, on the other hand, the states have been equally represented, as in the United States, Switzerland, Australia, Malaysia, the West Indies and Nigeria, or at least weighted to favour the smaller provinces as in Canada, India, and Germany. Members of these second chambers usually have been selected by a different method also. Most often the members have been selected by the state legislatures or governments. This method was used in the United States until 1913, and has been employed in some of the Swiss cantons, in Germany, in India,

²⁹ This argument was used, for example, in the West Indies. See Col. no. 255/1950, *British Caribbean Standing Closer Association Committee Report*, Rance, London, paras. 57-62. Cf. K. C. Wheare, *Federal Government*, *op. cit.*, pp. 13, 15.

³⁰ On the operation of the unicameral central legislatures in Pakistan, Rhodesia and Nyasaland, Malaysia, and Nigeria, see R. L. Watts, *op. cit.*, pp. 251-255.

³¹ The principle of representation by population was somewhat modified, however, in the West Indies and Malaysia. In the West Indies the representation of the two largest territories was somewhat reduced to avoid giving Jamaica alone an automatic majority in the House of Representatives, an arrangement which helped to alienate Jamaican support for the federation. In Malaysia there was considerable weighting of constituency sizes in favour of the predominantly Malay rural areas, and the Borneo states were overrepresented to entice them into the federation. For details see R. L. Watts, *op. cit.*, 256-258, 379, 383.

in Malaysia, and in Nigeria. In the United States since 1913, in some of the Swiss cantons, and in Australia members of the second chamber are elected directly by the electorate, but differ from the members of the primary chamber in that they are elected from constituencies representing a whole state or canton. The West Indians chose the method of nomination by the Governor General; but, unlike the Canadian system, such appointments followed consultation with the territorial governments rather than with the central government. None of the other federations has chosen to follow the Canadian example of placing the appointment of senators in the hands of the central government.

The exceptions in Pakistan and Rhodesia and Nyasaland to the general federal pattern of bicameral central legislatures were largely due to special circumstances. The first Pakistan Constituent Assembly had struggled with a variety of complicated bicameral schemes, all of which caused heated disputes over the regional composition and relative powers of the two chambers. Different arrangements for a balance of regional representation were advanced, and in two of the schemes the executive would have been responsible to both chambers.³² At the base of the difficulties was the fact that Pakistan at that time consisted of four provinces and six other lesser units, or groups of units; but one of these provinces, East Bengal, by itself contained more than half the federal population. Ultimately the problem was solved in 1955 by unifying all the other territories into the Province of West Pakistan, thus reducing the various divisions within the federation to just two provinces. Having achieved this, the second Constituent Assembly settled upon equal representation of the two provinces in the National Assembly and rejected a second chamber as superfluous. When constitutional government was restored in 1962, this arrangement was continued. If the solution adopted in Pakistan were applied in Canada, it would require the unification of all the English-speaking provinces into a single province, and that province and Quebec would have equal representation in the central Legisla-

³² The initial proposal that the four provinces should receive equal representation in a House of the Units caused a storm of protest in East Bengal, which felt that this was unfair to a province containing 55 per cent of the federal population, and which feared that this would place East Bengali representatives in a minority in joint sessions of the two houses. Subsequent bicameral schemes considered in the Constituent Assembly gave East Bengal parity with all the other regions combined, either in the second chamber or at least at joint sittings. Two of the proposals seriously considered would have given the two chambers equal powers over ordinary legislation, money bills, and control of the executive. The intention here was to counter-balance the East-Bengal majority in the first chamber. For the different schemes see Basic Principles Committee, *Interim Report*, Karachi, 1950, paras. 30-39; B.P.C., Franchise Sub-committee, *Report*, Karachi, 1952, pp. 1, 4; B.P.C., *Report*, Karachi, 1952, paras. 36-80; B.P.C., *Report* (as adopted), 1954, paras. 39-87.

ture. Such a solution is unlikely to be acceptable in Canada, however, not only because of the already strong historical sense of identity of the existing provinces, but also because Quebec represents only 29 per cent of the total Canadian population. In contrast, the two provinces of Pakistan were fairly well balanced with 55 per cent of the federal population in East Pakistan and 45 per cent in West Pakistan. Even in Pakistan, the bi-provincial solution has proved unsatisfactory, and in November 1969 President Yahya Khan announced that the experiment would be abandoned with the dissolution of the single unit and the restoration of separate provinces in West Pakistan.

The case of Rhodesia and Nyasaland offers no better precedent. The establishment of a unicameral central legislature there was only a transitional arrangement, and the constitution expressly provided for the later creation of a second chamber.³³ Furthermore, the continued controversy over representation in the Federal Assembly during the decade of that federation's existence made it a poor advertisement for the desirability of a unicameral legislature in a federal system.

Powers of Second Chambers

Most federations have established a central second chamber; but the effectiveness with which they have protected the smaller federating units and provided sectional and minority interests with an influential role in the making of federal decisions has depended on the relative power which the second chamber has held among the central institutions. A convenient classification of second chambers in this respect is that made by Lord Campion in distinguishing "strong" (coordinate) and "useful" (limited) ones.³⁴ The "strong" second chamber is one which is able to stand up to the popularly elected house on an equal footing, whereas the "useful" second chamber is one which maintains some degree of influence over legislation but only within the limits of restricted powers.

As a general pattern the pluralist federations, exemplified by the United States and Switzerland, have established second chambers of the "strong" type. Indeed, the United States Senate is, if anything more powerful than the House of Representatives, and has often been acclaimed the world's most powerful second chamber. Not only does the American Senate possess virtually all the legislative powers held by the House of Representatives, but in addition Senate approval is required for all treaties and executive appointments. By comparison with members

³³ Article 97(5).

³⁴ Lord Campion, "Second Chambers in Theory and Practice" in S. Bailey (ed.), *The House of Lords*, New York, 1954, pp. 23-25.

of the House of Representatives, the longer terms of the senators, the smaller size of the Senate, the larger area represented by each senator, and the additional constitutional powers over foreign affairs and executive appointments have enabled senators to become national figures with greater influence on legislation and policy. But the strength of the Senate is also related to another fact: since the president of the United States is responsible to neither house of Congress, the Senate does not find itself subordinate to the primary chamber on this account. Moreover, the separation of the executive from Congress has meant that party discipline in the Senate is relatively loose. Because their action cannot dislodge the executive from office, senators have been free not only to give full play to the expression of sectional views but also to form varying coalitions of sectional and state interests, cutting across party lines on different issues. Thus, although since the introduction in 1913 of direct popular election the Senate has been a "national body" as much as a forum for state interests, the equal representation of states and its strong constitutional powers have made it a very important element in the machinery by which sectional interests are balanced in order to produce a federal consensus.

Not quite as influential but in the same category of "strong" second chambers is the Swiss Council of States. In terms of legislative powers the two houses of the Swiss Federal Assembly are constitutionally equal with each other. Moreover, although the central executive committee, the Federal Council, is elected by these two houses in joint session, this executive holds office for a fixed term and therefore is not dependent for its continuance in office upon retaining the confidence of either central legislative house.³⁵ In practice the Council of States appears to have had comparable influence with the first chamber in the adoption of central policies and decisions. Furthermore, because of the cantonal ties of its membership the Council of States has served as an important link between cantonal and central politics. One writer has suggested that because of the effectiveness of other institutions for safeguarding constitutional rights, particularly the referendum, the legislature as a whole has played a less influential role in Switzerland than in the United States.³⁶ But it is a measure of the political effectiveness of the Council of States as a guardian of cantonal and minority interests that only a small proportion of constitutional amendments which have received the approval of the Council of

³⁵ It is true that since the primary chamber, the National Council, is larger than the Council of States it has more votes at a joint session and therefore carries more weight than the latter in the election of the executive Federal Council. But although it might consequently be said that the central executive owes its appointment more to the primary chamber than to the second, once the executive is in office the primary legislative house has no more control over it than that possessed by the second chamber.

³⁶ K. C. Wheare, *Federal Government*, *op. cit.*, p. 89.

States have failed subsequently to obtain the double majority at the referendum stage which is required for ratification.³⁷

In the parliamentary federations, and especially the Commonwealth examples, adherence to the principle that the Cabinet should be continuously responsible to the popularly elected legislative house has in each case led to second chambers which have been considerably weaker both in constitutional authority and in political influence and prestige. The second chambers in these federations must be classified, therefore, in the "useful" (limited) category. In each of the Commonwealth federations the popular chamber has had substantially greater power through having ultimate predominance in cases of conflict over the passage of ordinary legislation, through the control of finances, and through the responsibility of the Cabinet to it. For example, in Australia and the more recent Commonwealth federations, ordinary central legislation may be introduced in either house and normally requires passage in both; but in cases of deadlock between the two, the first chamber has been given power to override the other, either simply by later repassage (as in Malaysia, the West Indies, and Nigeria) or by outnumbering the members of the second chamber in a joint sitting (as in Australia and India).³⁸ In this respect the Canadian Senate has been an exception, insofar as the constitutional provisions give it equal power with the House of Commons over ordinary legislation; but in practice the Senate's lack of a political mandate has limited the exercise of its power of veto over legislation approved by the Commons.³⁹ All the Commonwealth federations restrict the initiation of money bills to the popular chamber; and, unlike the Canadian Senate, the later federal second chambers in the Commonwealth also have usually been restricted to only an advisory role in the passing of money bills. In all the Commonwealth federations the second chamber has been represented in the Cabinet, and in most of the newer federations all Cabinet ministers could be questioned in the upper house, whether they were members or not. Following the British parliamentary tradition, however, the Cabinet has always been responsible only to the popularly elected house. This more than any other factor has placed these second chambers in a position of subordinate influence and prestige. In one area, that of constitutional amendment, these second chambers, as guardians of provincial and minority interests, usually have been assigned constitutional powers equal to those of the popular chamber: the approval of the second chamber voting as a separate house has been required. But

³⁷ Of fifty-seven proposals approved by the Council of States, forty-five (79 per cent) were ratified in subsequent referenda.

³⁸ In the Australian procedure such a joint sitting only follows a double dissolution.

³⁹ R. A. MacKay, *op. cit.*, pp. 95-109.

otherwise the role of these second chambers has been more that of a "useful" advisory house, in which provincial and minority views might be expressed but whose political influence seldom would seriously impede the popular chamber and the Cabinet.

Because of the weakness of these second chambers in the parliamentary federal systems of the Commonwealth, the main political responsibility for reconciling conflicting sectional and provincial viewpoints within a federal consensus has had to fall elsewhere, upon regional representation in the Cabinet and upon the internal organization of the political parties. Indeed, there is some evidence that Macdonald and Cartier foresaw that this would be the case in Canada.⁴⁰ K. C. Wheare has summed up the situation as follows:

It is hard to escape the conclusion that if cabinet government is adopted in a federation, and if it is worked on the assumption accepted in Britain and in Commonwealth countries up to now, a second chamber cannot be an effective safeguard of states' rights, even if it be given in law equal powers with the lower house. The conventions of cabinet government are so strong that, in the end, they will weaken, if not nullify, the legal powers of the second chamber. This is not to say that states' rights cannot be safeguarded in federations where there is a cabinet system; but the safeguards must be provided in other ways.⁴¹

The reason for this situation has been the belief dominant in these countries that if there is cabinet government, the cabinet can be responsible to one house only, and that house must be popularly elected. This view appears to arise from the conviction that to make a cabinet responsible to two chambers of equal authority would be merely seeking trouble; for if there were different majorities in the two houses, a cabinet would be placed in an impossible position. Moreover, experience tends to indicate that wherever there is a cabinet system of government the popular house must be expected to become predominant, whatever the powers given to the second chamber in the constitution. Thus, although the Canadian Senate under the provisions of the British North America Act is granted considerably stronger controls over legislation than most federal second chambers in the Commonwealth, in practice it exercises no more influence and possesses no more (in fact, less) prestige. An even better instance is the Constitution of the Third French Republic, which went so far as to stipulate that ministers were responsible to both legislative houses. Despite such a constitutional provision, in practice it was

⁴⁰ R. A. MacKay, *op. cit.*, pp. 43-45. See also P. B. Waite, *The Life and Times of Confederation 1864-1867*, University of Toronto Press, Toronto, 1964, p. 116.

⁴¹ K. C. Wheare, *Legislatures, op. cit.*, p. 206. See also p. 201.

to the Chamber of Deputies, the lower house, that cabinets came primarily to owe their life and death.⁴² It is significant that the two federations which have "strong" second chambers equal in authority to their first chambers are the two federations — the United States and Switzerland — which do not have a cabinet system. Instead they have an executive branch which holds office for a fixed term and therefore is not dependent for its continuance in office upon retaining the confidence of one legislative chamber or another.

It must be noted that K. C. Wheare's generalization, quoted above, about the incompatibility of cabinet government and a powerful second chamber was based on assumptions about the nature and working of cabinet government which are widely held in Britain and the Commonwealth countries. Sweden, however, has actually managed to operate for some time an arrangement whereby the two chambers of the legislature have been equal in power with the Cabinet responsible to both.⁴³ Despite marked differences in the method of choosing the members of the two houses and in their terms of office, the two houses are treated as equal in every respect.⁴⁴ In the case of relations with the Cabinet, this equality is achieved by making the Cabinet responsible not to each chamber individually but to the two chambers jointly. In this way they have avoided the impossible situation in which a cabinet would find itself if it were responsible individually to two houses with different majorities in each. Furthermore, the Swedish arrangement has prevented the possibility of the Cabinet becoming, by convention, more responsible to the popularly elected chamber, as in effect happened in the French Third Republic.

Sweden, therefore, has found its solution in combining the two chambers and making it impossible for them to make any important decision separately. In their legislative procedure careful arrangements have been made to keep both houses in step. Every bill which is introduced goes to a joint committee of the two houses, and each house is equally represented on these. After a committee reports, the bill is considered in both houses simultaneously (as far as possible). To avoid requiring ministers to be in two places at once, the order paper of the two chambers is so arranged that although bills are debated at the same sitting, they are not considered in the same sequence. If the chambers

⁴² *Ibid.*, p. 202.

⁴³ For details see K. C. Wheare, *Legislatures*, *op. cit.*, pp. 207-209. During 1967, however, Sweden took steps which will lead to the conversion of its legislature into a unicameral one on January 1, 1971. The new arrangement is intended to create a less cumbersome system more suitable to a relatively compact modern society.

⁴⁴ Members of the second chamber are indirectly elected, being chosen by the provincial councils, and they serve a term of eight years, with one-eighth of the members retiring each year.

disagree when they vote, the bill goes back to a joint committee to seek a compromise agreeable to each house, but if either chamber rejects the proposed solution the bill is dead. The procedure for budget legislation is similar, except that if the two chambers are disagreed, the bill is not referred back to a joint committee; instead, the houses vote again and a majority of the votes of both chambers determines the issue. Because the popularly elected house (with 230 members) is larger than the upper house (with 150), the former has potential predominance in joint votes which concern the budget or affect cabinet responsibility. Yet in practice the popularly elected house has by no means been dominant.⁴⁵

Swedish bicameralism is unique in providing an example of a "strong" second chamber in a parliamentary system. Although Sweden is not a federation, its second chamber, composed of members chosen by provincial councils and virtually equal with the popularly elected chamber in constitutional authority and political influence, has come closer to playing the role performed by the second chambers in the United States and Switzerland than have the second chambers in any of the Commonwealth federations.

Among the parliamentary federal systems, a second chamber of special interest is the Bundesrat of the Federal Republic of Germany. Its composition and special constitutional powers have enabled it to fulfil an exceptionally influential role. Insofar as the executive is responsible to the popularly elected house, the Bundesrat by comparison is weaker. But a number of features have made the Bundesrat a more influential and significant body than the second chambers in any of the parliamentary federations in the Commonwealth. To begin with, the membership of the Bundesrat consists of the heads of government and some Cabinet ministers from the states, attending as instructed delegates appointed and controlled by the state governments. Thus, the Bundesrat gains stature by being in effect a board of state governments, whose members possess quasi-diplomatic responsibility on behalf of the Cabinets of their states. Furthermore, the Bundesrat has been given some special constitutional powers which have strengthened its position. For example, all bills of the central government must be submitted first to the Bundesrat for a statement of its position before being presented to the popularly elected chamber. This requirement has led to extensive federal-state negotiations over many central government bills before their formal presentation in the legislature. In addition to this special role in the introduction of central government bills, the Bundesrat possesses a veto over the passage

⁴⁵ For example, out of ten joint votes held in 1946 and 1947 over differences of opinion concerning budget legislation, each house won five. K. C. Wheare, *Legislatures*, *op. cit.*, p. 208.

of certain types of legislation. In cases of simple legislation the Bundesrat may only suspend a bill; but in cases of legislation which directly or indirectly affects state interests and functions, it has full power of veto. The Bundesrat has so defined its authority that in practice virtually half the legislation enacted by the federal Parliament has fallen into this category.⁴⁶ This has put the Bundesrat in a powerful position to influence federal legislative policy.

Another factor strengthening the Bundesrat is that the control over the executive held by the popularly elected chamber is weaker than in the parliamentary federations of the Commonwealth. The Chancellor is elected by the Bundestag and is responsible to it, rather than to the second chamber; but the control of the popularly elected house over the executive is partially limited by the requirement of the "constructive" vote of non-confidence. A vote of non-confidence in the Chancellor may be expressed only by simultaneously electing a successor, a procedure which has had an inhibiting effect on the Bundestag.

The effect of all these arrangements taken together has been to make the Bundesrat an influential component in the central institutions. It has played a major role in protecting state autonomy and interests; and by serving as a permanent meeting ground for the federal and state governments and their bureaucracies, it has become the major institution for intergovernmental negotiation and cooperation. Thus, the Bundesrat has guaranteed the effective and cooperative involvement of the states as political entities in the German political system.

One effect of the importance of the Bundesrat in federal politics, however, has been to induce the central political parties to take an active interest in state elections. Because the political parties can obtain representation in the Bundesrat only through control of the state Cabinets, the state elections have assumed in the eyes of the central parties importance as indirect Bundesrat elections. Some critics have gone so far as to suggest that the Bundesrat, which was intended to guarantee the state governments against central encroachments, by inversion of purpose has become instead an instrument for the subordination of the state parties to the central parties.⁴⁷ Nevertheless, most scholarly commentators on the operation of the German federal system have concluded that the net effect of the Bundesrat has been to strengthen the state governments, which had hitherto suffered on the fringes of significant political decision-

⁴⁶ E. L. Pinney, *Federalism, Bureaucracy, and Party Politics in Western Germany: The Role of the Bundesrat*, University of North Carolina Press, Chapel Hill, 1963, pp. 72-76; E. Plischke, *Contemporary Government of Germany*, Houghton Mifflin Company, Boston, 1961, pp. 82-84.

⁴⁷ For an examination of this view, see E. L. Pinney, *op. cit.*, Ch. 4.

making, by drawing them into the process for producing important federal policy decisions. These commentators appear to be agreed that the Bundesrat has played a major role not only in preserving state autonomy, but also in synchronizing governments and politics at the central and state levels.⁴⁸

Composition and Membership of Second Chambers

The role and impact of a central second chamber within a federal system depends not only on the legal power assigned to it by the constitution and the extent to which the executive is dependent upon one of the chambers, but also upon the composition and membership of the second chamber. In this respect second chambers have been shaped in response to two fears. The first has been the fear of the smaller provinces, or of a minority, that the larger and more populous provinces would use their majority in the popularly elected house to adopt policies injurious to their interests. The second has been the fear of both the large and the small states together that the central government might encroach unduly upon their authority and functions. Thus, among the major issues have been the allocation of seats in the second chamber among the large and small provinces and minorities, and the role which the provinces should have in the selection of its members.

The appropriate weighting of provincial and regional representation in a federal second chamber has nearly always been a matter of considerable controversy. To begin with, there has been the issue whether the second chamber should be composed of representatives of the provinces as political entities, or of representatives of minority groups or special interests as such. In contemporary Canada this issue comes to the fore in such suggestions as those of Jacques-Yvan Morin. He has proposed that the Senate should be converted into a kind of "chamber of nationalities", with half the members being representatives from the French-speaking population from all the provinces, so that these members would not represent the provinces but rather the "two nations" in equal proportions.⁴⁹ Such an arrangement might have been applied elsewhere — for example, to a Swiss second chamber, which would have been basically either "tri-national" or "bi-religious" in its character; to an Indian second chamber, which would have represented the ten or more major

⁴⁸ *Ibid.*, pp. 141-173. See also Karlheinz Neunreither, "Politics and Bureaucracy in the West German Bundesrat", *American Political Science Review*, Vol. LIII, September 1959, p. 729; Taylor Cole, "New Dimensions of West German Federalism", *Comparative Politics and Political Theory*, 1966, pp. 102-106, 119-120.

⁴⁹ Jacques-Yvan Morin, "Vers un nouvel équilibre constitutionnel", *op. cit.*, pp. 148-153. See also Maxwell Cohen's comments, *ibid.*, p. 177.

linguistic groups equally; to a Malaysian second chamber, which would have had equal numbers from each of the Malaysian races; to a Nigerian second chamber, in which the tribal groups rather than the regional political units would have had equal representation; or to a Central African second chamber, in which the black and white races would have had equal numbers. And yet in all of the federations considered in this study the fundamental basis of representation in the second chamber has been the states or provinces as political entities, rather than the racial, linguistic, or cultural group as such.⁵⁰ This may be attributed not only to the fact that the states and provinces, already organized as political units, have been in the strongest position to press their claims, but also to the fact that the states and provinces have been the fundamental units upon whose autonomy within a federal system the minorities have usually rested the defence of their interests.

In the representation of the provinces or states in the federal second chambers, equality of provincial or state representation has been the usual but not the universal solution. In the United States, Australia, Malaysia, Nigeria, and the West Indies the states have been equally represented in the second chambers; and in Switzerland each full canton has two representatives in the Council of States, and each half canton has one. But two other federations, like Canada, have not given provincial units equal representation, although membership has been weighted to favour the smaller units. Of these the West German Bundesrat departs less from equal representation.

The formula upon which the composition of the Bundesrat is based gives the largest state, North Rhine-Westphalia with a population of nearly sixteen million, only five seats, while the smallest state Bremen, with a population of about 700,000, has three seats. This formula assigns every state at least three seats, but gives states with more than two million inhabitants four seats, and states with more than six million five seats. The principle of weighting rather than state equality was derived from the tradition of earlier German second chambers, where the predominant size of Prussia and its refusal to be reduced to equality in the second chamber, made some form of weighting necessary. But the weighting under the 1949 constitution comes much closer to state equality than that which existed in any previous German second chamber.

In India, in contrast, weighting in the second chamber favours the

⁵⁰ In Malaya, India, and Nigeria a few places were reserved for special minorities or interests, but the majority of seats was reserved for representatives of the states. It is significant that in two of the federations marked especially by their multi-lingual communities — Switzerland and India — the federal second chamber is expressly given the label "Council of States".

smaller states only slightly. The formula upon which the distribution of seats among the states was originally based was one seat for each million of population for the first five million, and then one seat for every additional two million or part exceeding one million.⁵¹ The recommendation made by the Union Constitution Committee to the Constituent Assembly that there be a maximum of twenty members for any single state was not adopted, however, with the result that the larger states still hold a relatively strong position in the Council of States. For instance, the largest state, Uttar Pradesh, has thirty-four seats, while the smallest, Nagaland, has one. A scheme of weighting rather than state equality was adopted in India because, at the time the constitution was being drafted, the accession to the union of a large number of small princely states created a situation of wide disparity in the size of the political sub-units. Subsequently, the consolidation of most of these tiny states into larger units considerably reduced the relative disparity.

From the two examples of West Germany and India one might be led to expect that where the disparity in the relative sizes of the provinces has not been too great, the principle of equality of representation in the second chamber might prevail, and that where the disparity is extreme a system of weighted representation might be found. But this has not always been the pattern. If we take the ratios of the populations of the largest and smallest provinces in each federation, we find that the United States has the highest ratio (ninety-two) and yet in its Senate the states are equally represented. Moreover, the ratio in Switzerland is higher than that in either West Germany or India.⁵² It would appear, then, that the form of provincial or regional representation in federal second chambers has in practice depended on practical compromises rather than abstract theory.

This issue presents a particularly thorny problem for the composition of the Canadian Senate, because an important minority is concentrated in one of the largest provinces. If provincial equality of representation in the second chamber is insisted upon for all ten provinces, then the French-Canadian minority position is aggravated in the Senate. On the other hand, if Quebec's representation is heavily weighted in the Senate, then because Quebec is one of the largest provinces and because it would be difficult not to give Ontario, which is still more populous, at least equal representation with Quebec, it becomes difficult to provide the smaller provinces with an influential voice. Here the principles of

⁵¹ Constituent Assembly of India, *Report of the Union Constitution Committee*, New Delhi, 1947, Part IV, Ch. 2, para. 14(1) (a) (ii).

⁵² The ratio of the largest canton to the smallest half-canton is 87.5, but even if we take the ratio of the largest canton to the smallest full canton which has two members in the Council of States the ratio is 29 as compared to 21.8 in West Germany and 21.0 in India.

equal representation for provincial units and weighted representation for minorities point in opposite directions, making a solution such as Switzerland's impracticable. In the Swiss Council of States, equality of cantonal representation has meant that the two basic minority interests — the Roman Catholic and non-German-speaking areas — both of which have a vested interest in localism, have a permanent majority (twenty-three of forty-four seats) in the Council of States if they vote together. This has been one of the fundamental features in the political arithmetic of the Swiss federal system.⁵³ In the Canadian case, the original composition of the Senate in terms of three equal sectional groups of twenty-four members was clearly a pragmatic compromise to meet the demands both of the smaller provinces and of Quebec. The addition of more provinces since 1867 has created some anomalies, however. Each of the four western provinces, every one of them now with a population greater than any of the Atlantic provinces, actually has fewer seats in the Senate than either Nova Scotia or New Brunswick. Thus Canada is the only federation in which some of the smaller provincial units have not merely equality, but more representatives in the second chamber than the middle-sized units. At the same time the lone French-Canadian province has a considerably smaller proportion of the seats in the Senate than it has in the House of Commons. It is small wonder that French-Canadian Quebec cannot regard the Senate as a guardian of its interests. It is true that to some extent the appointment as senators of avowed representatives of the French in Ontario, the French in western Canada, and the Acadians in the Maritime provinces has worked towards redressing the balance, but the system of appointing senators has not helped to inspire confidence in their willingness to stand strongly against the federal majority. It appears that in the face of continued insistence by both Quebec and the small Atlantic provinces for substantial representation in the Senate, it will be difficult to alter the general principles of the pragmatic compromise on which the composition of the Senate was originally built. Some improvements might be made, however, by reducing some of the anomalies that have developed in the representation of the English-speaking provinces relative to each other, and by formally ensuring a larger proportion of French-Canadian representation from provinces outside Quebec by extending to these other provinces the system of senatorial districts which at present applies only in Quebec.⁵⁴ But even this latter arrangement is unlikely to give

⁵³ Christopher Hughes, *The Federal Constitution of Switzerland*, Clarendon Press, Oxford, 1954, pp. 88-89.

⁵⁴ Its purpose was to assure both the French-speaking Roman Catholic majority and the English-speaking Protestant minority in Quebec of a fair representation in the Senate.

French Canadians a voice equivalent to that which they already have in the House of Commons, unless the proportion of seats for Quebec is increased and the senatorial districts in other provinces are heavily weighted in favour of French-Canadian districts. Without some such solution, the Senate is unlikely to win much French-Canadian support as an instrument for safe-guarding their interests within Confederation. French Canada's real alternatives will appear to lie either in effective representation elsewhere in the House of Commons, the federal Cabinet, and the civil service, or in some special status or separation.

The method of selecting provincial or state representatives for federal second chambers has varied from federation to federation, although in all of them the method differs from that in the first chamber. Here there are three related issues. First, should the second chamber be composed of instructed delegates of the provincial governments, or of representatives free to act according to their own judgement? Second, should the provincial representatives be chosen by the state government or legislature, or should they be elected directly by the people of the province? Third, should members who already sit in a provincial legislature or executive be permitted to hold a seat concurrently in the federal second chamber?

The desire of both large and small states to make the federal second chamber a political bulwark against undue encroachment by the central government upon the functions and authority of the state governments has often raised the question whether the second chamber should consist of members who are instructed delegates of the state governments, or of representatives free to act according to their own judgement. Arguments can be advanced on each side, although the only existing example of the former arrangement is the West German Bundesrat. Members of the Bundesrat are appointed as instructed delegates of a state government and may be recalled by it at any time. Within the Bundesrat itself all of a state's votes must be cast uniformly, and one member may cast all the votes for a state. Thus, the delegates of a state serve in a quasi-diplomatic role on behalf of their state Cabinets. This arrangement has a number of advantages: it ensures that the federal second chamber clearly represents the views of the component state governments; the second chamber serves as a forum for the exchange of views between governments on prospective central legislation; the second chamber becomes the formal agency through which various forms of inter-governmental administrative cooperation can be effectively developed in a coherent manner, rather than being left to a vast array of uncoordinated ad hoc intergovernmental committees and conferences. Thus, it enables

the state governments to participate more effectively in the making of federal policy.

More commonly, federal second chambers have been composed of representatives free to speak and vote according to their own judgement. This is true of the second chambers in the United States and all the Commonwealth federations, and the Swiss constitution goes so far as to state expressly that members are to vote without instructions.⁵⁵ This arrangement has been favoured because it has been thought to be generally less disruptive and divisive, although no empirical evidence has been advanced upon which this contention could be conclusively accepted or rejected.⁵⁶ It has been assumed that where state representatives are instructed, every issue will divide states against each other in blocks, thus perpetuating regional rivalries, antagonism, and distrust; but that where representatives are uninstructed, divisions within the second chamber may cut across state blocks and align members of the same state into different groups, thus underscoring wider interstate loyalties. Moreover, members are likely to be more amenable to compromise if they are not committed by instructions prior to the debate of an issue, thus making it easier to evolve a consensus. A further point sometimes advanced is that this arrangement also makes it possible to represent in the second chamber other interests than only those of the governing majority of each province.

The issue of whether members of the second chamber should be selected by the state governments or legislatures, or by some other method is, of course, related to the question of whether they are to be instructed delegates or free representatives. The members of the West German Bundesrat, as delegates of the state governments, are chosen by the state Cabinets. But even in the other federations, where it was agreed that members of the second chamber should be free to act according to their own judgement, selection of senators by the state government or legislature frequently has been the practice. This was the original pattern for the American Senate; but it was replaced by direct election in 1913 because of the controversy, corruption, and scandals in the state legislatures which accompanied the system. But despite the experience of the United States, the indirect election of state representatives remains the most widely used method for federal second chambers. In Switzerland the constitution leaves it to the cantons to determine the procedure for selecting their representatives to the Council of States, and although many cantons have opted for direct election, four

⁵⁵ Article 91.

⁵⁶ R. R. Bowie and C. J. Friedrich (eds.), *Studies in Federalism*, Little, Brown, Boston, 1954, Ch. 1.

retain the method of election by the cantonal legislature. The postwar Commonwealth federations also have followed the pattern of selection by state legislatures, with variations only in detail. In India the state representatives in the Council of States are elected by the state legislative assemblies, and the use of proportional representation has ensured the election of members of minority parties and interests from within each state. In Malaysia senators are also elected by the state assemblies; but although any assembly member is free to make nominations, the use of a simple majority ballot system has meant that only nominees of the party governing in a state have been elected. In Nigeria the regional governments had even tighter control over the selection of senators. The procedure laid down by the constitution was that the senators for each region were to be nominated by the regional government, this nomination being subject to an affirmative vote at a joint sitting of the legislative houses of the region concerned. In the West Indies, the territorial legislatures played no part in the process, appointments to the Senate being made by the Governor General (at first at his discretion, but later according to the advice he received) after prior consultation with the territorial government. Thus, in all these federations the manner of selection has made the members more clearly representative of the component states than are the Canadian senators appointed by the central government.

In three federations, the method of direct popular election has been used for the second federal chamber. In these cases members of the second chamber have been distinguished from members of the first chamber by the fact that their constituencies are state-wide. Australia has used this method of election from the beginning, and the United States adopted it in 1913. The third federation where direct election has been used is Switzerland, where many of the cantons have chosen to select their members to the Council of States either by direct ballot or by an open meeting of all the cantonal voters. It is significant that two of the federations where direct election has been employed for members of the second chamber are pluralist federations. In the United States and Switzerland this procedure has given the second chamber authority direct from the people and a popular mandate enabling it in representing state or cantonal views to speak on even terms with the primary chamber. In Australia, however, the political strength that direct election might have given to the voice of senators has been weakened by two factors. One is the principle that the Cabinet is responsible to the House of Representatives only. The second is the vastness of the state-wide electoral divisions in Australia. This has made candidates dependent upon the support of the party organizations for successful election, and as a result senators have become primarily representatives of their parties rather than of

their states. These two factors together have lowered the prestige and effectiveness which the Senate might have been expected to have as a guardian of state interests, and have made it instead simply a pale reflection of the party politics of the lower house. It is significant that none of the succeeding parliamentary federations has seen fit to copy the Australian precedent of a directly elected senate, but that all have instead preferred the selection of state representatives by state legislatures or governments as a method more likely to produce a second chamber speaking effectively for state and regional interests.

Of the federal systems under consideration, Canada is unique in having all its senators appointed by the central government. But although the other federations have all rejected this method as being inappropriate for selecting regional or state representatives, three federations — India, Nigeria, and Malaysia — did make some provision for some additional members to be appointed to the second chamber by the central government, either for their eminence or to represent special minorities or interests. The principle of nomination was defended in the Indian Constituent Assembly with the argument that it would “give an opportunity, perhaps, to seasoned people who may not be in the thickest of the political fray, but who might be willing to participate in the debate with an amount of learning and importance we do not ordinarily associate with the House of the People”.⁵⁷ The constitution, therefore, has provided for twelve of the 238 members of the Council of States to be appointed by the central government from the fields of literature, science, art, and social service; and the actual appointments appear to have been in keeping with the original intention.⁵⁸ Similar arguments resulted in Nigeria in four of the fifty-two senators being appointed by the central government, although the Nigerian constitution did not specify the grounds on which such appointments were to be made.⁵⁹ The four nominated to the first Nigerian Senate included two from the field of higher education, a banker, and a medical doctor, the latter being one of the two senators who became Cabinet ministers. But whereas in India and Nigeria the nominated members constituted well under 10 per cent of the total membership in their second chambers, in Malaya and later Malaysia appointed senators formed a much more significant proportion, constituting over 40 per cent of the Senate. Consequently, although the constitution expressly stipulated that those appointed by the central government should be persons who “have rendered distinguished public service or have achieved distinction in the professions, commerce, indus-

⁵⁷ C.A.I., *Debates*, Vol. IV, pp. 927-928.

⁵⁸ Article 80(3).

⁵⁹ Constitution (1963), s. 42(1) (c).

try, agriculture, cultural activities or social service or are representatives of social minorities or are capable of representing the interests of aborigines", here, as in Canada, political party considerations have tended to prevail in the making of appointments. Of the initial group of senators appointed, only about half could be described as representatives of special economic interests or minority groups, while the remainder were quite blatantly party appointments.⁶⁰ Moreover, the tendency for most of the nominated senators to come from certain states has given the two largest states the same proportion of representation in the Senate as that which they have held in the primary chamber, thus in effect nullifying the principle of equal state representation in the Senate. Experience elsewhere seems to confirm the Canadian experience that unless the proportion of centrally appointed senators is kept to a very small proportion of the total membership, a senate is unlikely to express effectively provincial and regional points of view.

The third question related to the selection of the members of a federal second chamber is whether members who already sit in a provincial legislature or cabinet should be permitted to hold a seat in the Senate at the same time. A general concern that concurrent membership in two different legislative bodies might involve a member in conflicting loyalties which would militate against his effectiveness in either, and sometimes the argument that concurrent membership would violate the doctrine of dual federalism requiring each government to be independent of the other level of government, has led many federations to prohibit dual membership in state and central legislatures or governments. Examples among the older federations are the United States, Canada, and Australia; and among the newer federations, India, Nigeria, and, after several changes of mind, the West Indies. But in three federations concurrent membership in the state legislatures or executives and in the federal second chamber (but not the central executive) has been permitted. A number of arguments have been advanced in favour of such an arrangement. In the newer federations, for example, it has been seen as a way of economizing on the total number of experienced legislators demanded by a federal system. But the argument more often advanced is the contention that dual membership provides useful contacts between the interdependent central and state legislatures and governments, and minimizes conflict between the two levels of government. Thus, the second chamber can serve as a bridge between central and state politics within the federal system. The West German Bundesrat goes furthest in this direction; here, only members of state Cabinets are eligible to

⁶⁰ R. L. Watts, *op. cit.*, pp. 261, 380.

represent states on the floor of the chamber, and state delegations normally are led by their heads of government. For committees of the Bundesrat a state government may delegate alternates, usually permanent civil servants from the state. This has made the Bundesrat not only a strong vehicle for the expression of state points of view, but also an extremely effective instrument for intergovernmental negotiations. The other two federations which permit dual membership have not gone so far; for in neither Switzerland nor Malaysia are members of the second chamber required to have dual membership, nor are they instructed delegates subject to recall. Nevertheless, the fact that a large number of the members of the federal second chamber happen also to be simultaneously members of a cantonal or state legislature or executive has added weight to their views in the second chamber, and has provided a valuable link between the two levels of government.⁶¹ In neither of these federations does dual membership appear to have imposed too heavy a burden on the individuals involved, although it must be noted that the cantonal and state units in these two federations are relatively small political units compared to those in some other federations.

Lessons for Canadian Senate Reform

In the preceding sections I have attempted to raise the crucial issues and to point to the solutions to them attempted elsewhere, rather than to present a blueprint for reform of the Canadian Senate. In concluding I shall summarize the lessons which emerge as they bear on any attempt to reform our own Senate, noting some of the options which are available to us.

The starting point for any attempt to reform the Senate must lie in seeing it in its context as one element within an interdependent federal system. To look on it as an institution by itself, or even as one in a group of central institutions, is to see its functions out of focus. Its effectiveness can be judged only by the extent to which it contributes to the ability of the Canadian political system as a whole to meet the needs and demands of Canadian society with all its diversity. From this perspective it is apparent that although the Senate has been a more efficient legislative body than has generally been recognized, it has failed to perform the fundamental role usually expected of second chambers in federal systems, of ensuring the distinctive sectional or cultural minorities

⁶¹ For example, in 1960 in the Swiss Council of States 43 per cent of the members were at the same time cantonal ministers or legislators, and many of the others were former cantonal ministers or legislators.

effective participation in the formation of central policies and decisions. Insofar as such minorities have had an impact in central politics, it has been through other channels, such as representation in the Cabinet and in political parties striving to form the widest aggregation of sectional interests in order to capture an electoral majority in the House of Commons. Indeed, the method of appointing senators combined with the responsibility of the Cabinet to the House of Commons has made the Canadian Senate one of the weakest second chambers, in terms of political influence, to exist in any federation. In the light of the crisis faced by the Canadian federal system as a whole, there appears to be an urgent need to improve the ability of the Senate to assist in the process of generating a federal consensus which accommodates the interests of the distinctive sectional and cultural minorities. Senate reform alone cannot be expected to solve all the contemporary problems of Canadian Confederation, but it may contribute to their resolution.

The direction Senate reform might take will be related to a prior decision about the type of federal system within which it is to operate. Our choice between the pluralist and parliamentary forms of federal system must depend upon our assessment of the ability of the parliamentary form to cope successfully with the demands and conflicts of a multi-cultural society. The parliamentary federal system in Canada has at times during the last decade been under considerable strain as political parties have had difficulty in aggregating support from a sufficient range of groups to win a parliamentary majority. The experience of some of the other multi-cultural parliamentary federations in the Commonwealth suggests that this form of federal system places the burden for reconciling different interests and for generating a federal consensus almost totally on the political parties, and that when they fail in this task the result in the end has been federal disintegration. In pluralist federal systems, on the other hand, the distribution of authority among multiple centres of power and the way in which these interact to check and balance each other has greatly assisted the process of reconciling diversity in unity. Should we decide that the Canadian crisis is sufficiently severe that the present structure of the political parties cannot be relied upon to produce a federal consensus, then the survival of Canada as a bilingual and bicultural federation may depend upon a radical conversion of it into a pluralist federation. In such a system, a powerful Senate comparable to the second chambers of the United States and Switzerland would be an essential component.

On the other hand, since the parliamentary form of federal system has already survived a century in Canada, since parliamentary traditions are deeply rooted in the history and traditions of Canadian politics, and

since a system of responsible cabinets is less prone to the protracted delays, deadlocks, and often immobility experienced in pluralist federations, Canadians will be reluctant to abandon the hybrid of federal and parliamentary government which was their major innovation in 1867. But it must be recognized from the beginning that within a parliamentary federal system in its usual form, the second chamber can normally be expected to play a less major role in the process of uniting diversity.

Even if we stand by the choice of a parliamentary federal system, reformers of the Senate are still faced with a range of options. The Senate might still be made a "strong" coordinate second chamber if, on the Swedish pattern, the Cabinet were made responsible jointly to both houses of Parliament. Such an arrangement would hardly be tolerated if senators continued to be appointed, as they are today, by the central government. But if the Senate were composed, as in Sweden, of representatives elected by the provincial legislatures, then this arrangement could become a means for providing minorities with a more influential voice both in the process of legislation and in the control of the Cabinet. Alternatively, if the Cabinet were made responsible only to the lower house, the Senate, like the West German Bundesrat, might be assigned certain special functions related to the protection of the functions of the provincial governments. If this pattern were followed, the Senate might be given the right of prior consultation on legislation proposed by the central government before its presentation in the popularly elected house; the right of veto over legislation (including financial measures) which affects or relates to the functions constitutionally assigned to the provincial governments; and, if the Senate's membership consisted of provincial Cabinet ministers, the opportunity to serve as the major channel for intergovernmental negotiations. A third alternative is the pattern prevalent in the parliamentary federations of the Commonwealth. In terms of constitutional powers this would mean a Canadian Senate no stronger than it is today, limited to relative lack of influence by the predominance of the House of Commons through its control over the Cabinet and over the introduction of financial measures.

Whichever of these patterns concerning the constitutional powers of the second chamber within a parliamentary federation is chosen — whether the Senate is made coordinate on the Swedish model, is given special responsibilities along the lines of the West German Bundesrat, or remains fundamentally advisory in the Commonwealth tradition — the political influence of the Senate will depend also upon the character of its membership. The present form of appointment and tenure to the Canadian Senate has failed to win the respect of the public; and as long as the Senate incurs ridicule or is looked on with indifference, it can

hardly play an effective role among the institutions whose function it is to foster a federal consensus from among diverse sectional views. Experience elsewhere suggests that either direct popular election or indirect election by provincial legislatures or governments is preferable to appointment of senators by the central government, and that in parliamentary federations indirect election is more suitable. R. A. MacKay has already suggested that representation of the provinces by senators who are provincial appointees serving for limited terms of five or seven years might well increase the usefulness of the Senate.⁶² In arguing for this reform, he declared:

There is much to be said for reform along these lines. It should tend to give to the Senate a sense of purpose; and to the provinces assurance that, whatever the colour of their administrations they could be heard on the floor of Parliament. And it should tend to promote interest on the part of the public in the Senate's proceedings, which is today notoriously lacking. In sum it would enhance the prestige and usefulness of the Senate.⁶³

But MacKay, fearful of any radical reform, cautiously suggested that only one-third or one-fourth of the senators should be appointed by the provincial governments. The experience of Malaysia and the other new Commonwealth federations suggests that if the Senate is to achieve the political impact in representing provincial viewpoints which MacKay hoped for, an overwhelming majority of its members should be elected by the provincial legislatures or appointed by the provincial governments. If any senators at all are to be appointed by the central government, the proportion should probably be limited at the very most to one-fifth of the total membership, with the remainder being chosen by the provinces. Senators in either category should hold office for terms no longer than between five and eight years, if they are to be responsive to changing currents of provincial and minority opinion.⁶⁴

In view of the increasingly unavoidable interdependence between governments within contemporary federations, a reasonable case might be made also for permitting concurrent membership in the Senate and in a provincial Legislature or Cabinet as a way of providing a bridge between provincial and federal politics. Indeed, there is much to be said for Peyton Lyon's suggestion that we should go even further, as the West Germans have done, to the point of converting the Senate into a body composed of representatives of the provincial Cabinets, thus enabling it

⁶² R. A. MacKay, *op. cit.*, pp. 185-188; and "Here's How to Reform the Senate", *Canadian Commentator*, May 1963, pp. 2-3.

⁶³ R. A. MacKay, "Here's How to Reform the Senate", *op. cit.*, p. 3.

⁶⁴ The longest term in any other federal second chamber at present is eight years.

to become a kind of standing federal-provincial conference.⁶⁵ Canadians may not be in the habit of looking to the Germans for lessons in the art of self-government; but this is one instance where the West Germans, benefiting from Canadian experience, have produced an institution upon whose effectiveness within their federal system most critics have agreed. In such a Senate its members would be provincial premiers and Cabinet ministers serving in effect as the instructed delegates of the provincial governments and subject to recall at any time a provincial government wished.⁶⁶ This arrangement would enable senators to speak with real authority for provincial interests, since they would be responsible to democratically elected governments in the provinces and would normally resign whenever their governments lost the support of their electors. The Senate would become a more effective check than it has been in the past upon any tendencies for provincial functions to gravitate into the hands of the central authorities. At the same time, participation in the deliberations of the Senate would enable provincial governments, including Quebec, to contribute to the making of federal policy and would encourage ministers of provincial governments to broaden their outlook and to give more consideration to problems of federal concern. Moreover, if federal Cabinet ministers were invited to take part in the deliberations of the Senate, as they are in the Bundesrat, cooperation between the federal and provincial administrations would be encouraged especially in areas such as economic policy, in which both levels of government are vitally concerned. Also important, cooperation among the ten provinces would be facilitated. If German experience is any guide, such a second chamber would probably also provide an inducement for the closer synchronization of the operation of political parties at the central and provincial levels. This would reduce to some extent the independence of provincial political parties but would encourage federal parties to give even more attention to the reconciliation of different provincial points of view. A Senate on this pattern would certainly perform a distinctive and useful function in the political processes of the Canadian federal system.

There remains, finally, the issue of the appropriate regional distribution of seats in the Senate. If we accept the criterion used for most federal second chambers that representation should favour the smaller

⁶⁵ Peyton Lyon, *op. cit.*

⁶⁶ The development of jet air transportation makes the attendance of provincial ministers in the Senate feasible. In West Germany, the Bundesrat is able to transact its business very quickly, meeting as a body for only several days a month with state premiers and finance ministers nearly always managing to attend. This has been possible because much careful preparatory work has been done in advance by provincial civil servants stationed for this purpose in the federal capital.

provinces and minorities, then in the Canadian case equal representation for all provincial units is clearly unsuitable, because it would sharply reduce rather than favour French-Canadian strength in the Senate. The distribution of seats in the Senate will have to be a pragmatic one, weighted to favour both the smaller provinces and French-Canadian representation, much on the pattern of the present arrangement — although some of the anomalies might be corrected. An important adjustment will be to ensure adequate French-Canadian representation, for only then can this group be expected to look upon the Senate as an institution safeguarding its interests. One possible solution is the extension to other provinces of the senatorial districts now existing only in Quebec. In this way it would be made clear that French-Canadian representation from other provinces did not rest merely on convention. But such a scheme might not fit very conveniently a second chamber composed of delegates from provincial Cabinets. An alternative would be to follow something like the Indian pattern. Four-fifths of the Senate seats might be allocated to representatives selected by provincial Legislatures or Cabinets, but up to one-fifth of the places might be reserved for senators appointed by the central government to represent minority groups. Half of this latter group might then be set aside for French Canadians. If the four-fifths allocated to provincial representatives were distributed among provinces roughly in the proportions assigned to provinces now, the combined effect of Quebec representation bolstered by half the seats reserved for minorities, and further supplemented by some French-speaking members that would undoubtedly be among the provincial representatives sent by Ontario, New Brunswick, and Manitoba, would mean that close to 40 per cent of the senators would be French Canadians. This would assure French Canadians of a stronger voice in the Senate than they now possess. Whatever scheme of composition is finally arrived at, the Senate cannot be expected to have the confidence of the French-Canadian minority as a guardian of their interests in central politics unless their representation is sufficient to give their views a significant influence in its decisions.

NOTE

A summary of the composition, powers, and effectiveness of the second chambers for each of the United States of America, Switzerland, Australia, West Germany, India, Malaysia, the West Indies Federation and Nigeria, which was prepared as an appendix to the original paper, may be obtained upon request to the author by persons willing to pay the cost of xeroxing. Requests should be addressed to R. L. Watts, Department of Political Studies, Queen's University, Kingston, Ontario.

The Senate

Eugene Forsey

In any federal system, certainly in ours, there must be an Upper House, and it must be based, in some way or other, on representation of the constituent parts of the federation; in Canada, on provinces or groups of provinces, regions. The interests of the provinces or regions as such must be represented in the federal Legislature.

But what do we mean by "interests" and what do we mean by "provinces"?

Interests of the provinces in what? In matters coming within the jurisdiction of the Government and Parliament of Canada. These are the *only* matters which can come before the Senate. Provincial interests in provincial questions are matter for the provincial governments and Legislatures. The protection of provincial jurisdiction is a matter for the courts.

There is no evidence that the Senate was intended to prevent the dominion government and Parliament from *exceeding* their jurisdiction: the courts would see to that. Nor is there any evidence that the Senate was intended to prevent the dominion government and Parliament from *exercising* their jurisdiction. It was, rather, intended to give Quebec and the smaller provinces some assurance that, in the exercise of that jurisdiction, their interests should have a weight beyond what the size of their population would give them.

Legislation and policy on matters within the jurisdiction of the Government and Parliament of Canada can have very different effects on different provinces. Tariffs, railway policy, monetary policy, are conspicuous examples. Undiluted "rep. by pop." could produce inequities which might come near destroying historic communities. It was hoped, in 1867, that, for example, the twenty-four senators from the

Maritime provinces, uniting with minorities of the senators from Quebec and perhaps Ontario, would be able to prevent the financial and industrial interests of Ontario and Quebec from having things all their own way.

The Senate, then, was not intended to be a set of watch-dogs for the provincial governments or Legislatures, guarding provincial constitutional property. Nor was it meant to provide an arena where provincial toreadors could fight the dominion bull.

So much for the "interests". What do we mean by "provinces"? Their *governments* or their *peoples*? The two are not identical. A provincial government, even a provincial Legislature, chosen to deal with matters within provincial jurisdiction, will not necessarily reflect the views of the province's electors on matters within dominion jurisdiction. (The fact that the same electors, at approximately the same time, will vote for opposite parties in dominion and provincial elections is notorious.)

The Fathers of Confederation, by what they said on the subject, and by vesting the appointment of senators in the central government, made it plain that the provincial interests the Senate was to protect were the interests not of the provincial governments or Legislatures but of the provincial peoples, in matters under dominion jurisdiction. And they were right.

If so, and if the present method of choosing senators is rejected, then logic points to direct election, as in the United States and Australia. Presumably, the senators would be elected at the same time as members of the House of Commons. They would be elected on dominion issues, to deal with dominion questions. They would not be delegates of provincial governments.

The dominion White Paper, *The Constitution and the People of Canada*,¹ dismisses this as incompatible with cabinet government; and not without ground. The fundamental principle of cabinet government is that the executive is responsible to the people's representatives and, through them, to the people. Responsible government means the responsibility of the Cabinet to the elected House of Commons, which is the dominant house in Parliament. But with an elected Senate, as well as an elected House of Commons, where would ultimate legislative power and Cabinet responsibility lie? At present, the appointed Senate dare not defy the House of Commons for long. It has no power base. But if the Senate were elected, it *would* have a power base, and would be in a position to say that it represented the people just as much as the House

¹ The Right Honourable Pierre Elliott Trudeau, *The Constitution and the People of Canada*, Queen's Printer, Ottawa, pp. 76, 78.

of Commons. If the senators from each province were elected by the province as a whole, and still more if they were elected by proportional representation (and there would be strong arguments for this), they might well claim that they really represented the people *better* than a House of Commons elected by single-member constituencies, and, with a multi-party system, often consisting largely of members elected by minorities, and dominated by a government which had received only a minority of the popular vote. Such a Senate might well decide to defy the House of Commons even through a series of general elections. The result might be partial or general paralysis of the Government of Canada.

The Province of Canada, in the last decade before Confederation, began the experiment of an elected Legislative Council, with no very satisfactory results. George Brown, who vehemently opposed the measure, predicted a collision between the two houses and the breakdown of responsible government. These dreadful consequences did not take place, of course; but there is some evidence that the Council was becoming increasingly conscious of the strength of its popular base, and increasingly confident in the exercise of its powers. At all events, when the coalition government came to prepare its federal plan in 1864, it was quite obvious that the Canadian ministers had changed their minds about the Legislative Council. They abandoned popular election in favour of appointment for life by the central government. And the Maritime delegates at the Quebec Conference overwhelmingly agreed with them.

Australia, however, has managed, for almost seventy years, to combine a government responsible to its Lower House with an elected Senate. Perhaps we could too. The matter deserves to be considered, especially if the White Paper's proposals appear, on examination, to have disadvantages which their authors may have overlooked or underestimated.

The White Paper proposes that the Senate should be "partly selected by provincial governments". This raises another aspect of the question, "What do we want the Senate to do?"

If we want to make the central government less efficient in doing its job, then appointment of Senators by provincial Governments is an excellent way of going about it; and the larger the proportion of provincial appointments, the better we shall succeed. The West Germans have *all* the members of their Upper House appointed by the *Länder*, and precisely because the American godfathers of the West German Constitution wanted to keep the central government and Parliament as weak as possible.

But if we want to make the central government more efficient in

doing its job, then provincial appointment of senators looks less attractive. It amounts to giving provincial governments the power to place their own chosen monkey-wrench flingers right in the middle of the central governmental machinery.

The smaller the proportion of provincially appointed senators, the smaller the damage; but the smaller also the likelihood that the provincial governments will buy the package. The central government, understandably, does not commit itself to any particular proportion. But if it commits itself to the principle, it will have great difficulty stopping short of making the proportion very large; especially as this is one case where all the provincial governments will sing "to one clear harp in divers tones".

The purpose of having provincially appointed senators is to give the provincial governments a feeling that they have a share in the making of central legislation and certain central appointments. But (quite apart from the question of whether they ought to have any such share) will they, especially Quebec, be satisfied with only some senators? Won't they want a very large proportion, or perhaps all?

They may feel that the proposed Senate deserves Lord Palmerston's description of Sir Gilbert Scott's second design for new Government buildings in Whitehall. Scott had wanted Gothic, Palmerston Italian Renaissance. Scott, horrified, produced a compromise design which, "while preserving the essential character of the Gothic," might "give a superficial impression of the Classical style." Palmerston called this "Neither one thing nor t'other — a regular mongrel affair." The provincial governments may say the same of this proposal, and demand a Canadian version of the West German Bundesrat.

The Parliament and Government of Canada exist to deal with dominion, national, "federal", Canada-wide, questions, as defined by the Constitution. The members of the House of Commons are elected, and the senators are appointed, for that purpose. The Legislatures and governments of the provinces exist to deal with provincial questions, as defined by the Constitution. They are elected for that purpose. Why should provincial governments, elected on provincial issues to deal with provincial questions, appoint members of the dominion Parliament?

We shall be told that State or provincial governments or Legislatures in other federations appoint or elect members of the federal Upper House, or have done so. If it can be shown that this works satisfactorily in such other federations it is certainly an argument for trying it here, if we really want it. But the mere existence of such an arrangement elsewhere is not a conclusive argument for adopting it here. We are supposed to be making, remaking, or amending, a Constitution for Canada,

not some other country; and a rag-bag of bits and pieces from the constitutions of other countries will not necessarily meet our Canadian needs.

We shall also be told that there are "grey areas", matters which can be dealt with effectively only by joint dominion-provincial action. Of course there are. But would a Senate made up wholly or partly of provincial delegates be in any position to deal with these? Could the provincially appointed senators bind their provincial governments and Legislatures? Surely the obvious and sensible way of dealing with matters which come partly under dominion, partly under provincial, jurisdiction, and require joint action, is by negotiation and agreement between the governments, with the dominion government looking after the dominion interest, and the provincial governments provincial interests, and with each government responsible to its own legislative body and electorate?

Could a Senate made up even wholly, let alone partly, of provincial delegates take the place of dominion-provincial conferences? Does anyone believe it would?

The probable quality of provincially appointed senators is ground for some uneasiness. The White Paper hopes for a "healthy competition" between the central and provincial governments in appointing people of high calibre to the Senate. I am afraid this represents "the triumph of hope over experience". Any Prime Minister is bound to be under terrific pressure to appoint to the Senate people whose main qualification is their service to the political party concerned. This can lead, and has led, to some excellent appointments. But it can also lead, and has led, to some very bad ones: worn out party warhorses or just party hacks. The Senate has also been used to get rid of party nuisances in the House of Commons, or to open seats for Cabinet Ministers drawn from outside that House. I can see no reason to believe that provincial prime ministers would not be under the same pressures, leading to the same results. The results might be even worse: worn out warhorses, or hacks, or nuisances, not of national but of parish pump politics.

The White Paper also proposes a "review of the distribution of Senate membership". Almost certainly, this would mean giving both the West and Quebec a larger proportion of senators, with a corresponding decrease in the Atlantic provinces' proportion, and Ontario's. Ontario might be willing; I doubt if the Atlantic provinces would be; and there might be a good deal of heated wrangling among the rest over just who should get how much. The Atlantic provinces would be particularly worried about the effect on their present guarantee of at least as many seats in the House of Commons as in the Senate. The whole thing looks

like stirring up a hornet's nest with a short stick. A first-class row about something which is really necessary is one thing; a first-class row about a non-essential is another.

The White Paper further proposes special powers for the Senate.

1) *Power to approve nominations of judges to the Supreme Court of Canada.* Something would depend, here, on the proportion of provincially appointed senators, and their quality, and the possible redistribution of seats. Something would also depend on what size of majority was required for approval: one more than half of the total membership, one more than half of those voting, two-thirds of the total membership, two-thirds of those voting? Or what? Would the situation be such as to give the senators appointed by the Government of Quebec a veto on appointments? Would it be such as to give the senators appointed by other provincial governments a veto on the appointment of the judges from Quebec?

Would this special power make it easier or harder to get first-class men to go on the Supreme Court bench? For years we have been hearing that first-class lawyers are reluctant to accept such appointments. If they know beforehand that they may have to go through the kind of inquisition that several recent nominees for the United States Supreme Court have had to go through in the American Senate, will they be less reluctant, or more?

2) *Power to approve the appointment of ambassadors.* The same unknown factors (proportion of provincially appointed senators, and so on) would operate here.

But there is one further point. On the whole, now, surely, we appoint as ambassadors career diplomats. Mightn't this new procedure tend towards making more political appointments, and, to get the votes of the parish pump boys, worse ones? Mightn't we get provincial governments trying to use the Senate to get *their* candidates for embassies appointed?

3) *Power to approve the appointment of heads of "cultural agencies".* This presumably would include the CBC, the NFB, the National Library, the Public Archives, the National Gallery, the National Museums, the Canada Council. Would it also include the CRTC, the Dominion Observatory and the Research Council? Are we going to name the agencies in the Constitution? If so, how shall we provide for new ones, new aspects of culture which may arise, or new agencies to deal with certain existing aspects?

Will having to run the gauntlet of the Senate improve the quality of appointments to these offices? Isn't there danger of getting inoffensive mediocrities (I got nominated for the Montreal City Council on the

stated ground that, while no one in the local CCF very much *wanted* me, no one very much *didn't* want me: Sir John Abbott got the premiership on the same basis, though his "supporters" were less explicit!) Alternatively, isn't there a danger of log-rolling on behalf of local favourites, who might be mere duds, but might even be half-cracked, or fanatics?

4) "Special responsibilities" for, and a veto on, legislation on "official languages and human rights". Here, obviously, a great deal will depend on whether or not we get a Charter of Human Rights, and how much it covers.

If we get a comprehensive Charter, the field for dominion legislation will be narrower than if we don't. But even with a comprehensive Charter, there might be room, and need, for a good deal of positive legislation to make the rights effective within dominion jurisdiction; without a comprehensive Charter, there would be still more room, and need, for legislation within dominion jurisdiction.

Obviously, the government's intention is that the reconstituted Senate should block legislation *restricting* linguistic and human rights. But it seems to me more likely that it would block legislation *extending* them, or making them more effective. I see little reason to suppose that the dominion-appointed senators would be any more liberal-minded than they are now, and equally little reason to believe that the provincial appointees would be any better. Think of what senators appointed by certain provincial premiers would be like on legislation to promote or safeguard the use of French! Think what senators appointed by some premiers would be like on human rights.

Of course the Senate can now, in law, block, absolutely and forever, any legislation on these subjects. But its weakness is such that it is most unlikely to flex its decrepit muscles for this or any other purpose. The new Senate, however, deliberately endowed with special powers over certain matters, would, in effect, be invited to take itself much more seriously, and to exercise such powers. Besides, the provincially appointed senators would have none of the inhibitions which three-quarters of a century of growing weakness and lack of prestige have bred in the present senators. And the larger the proportion of provincially appointed senators, the greater the danger of road-blocks would be.

The White Paper would reduce the Senate's powers over ordinary legislation: its "rejection of a bill could be overcome by the Lower House acting in accordance with specific procedures . . . to be set out in the Constitution". This is exceedingly important; but it is also bafflingly, and maddeningly, vague. Does it mean a Canadian Parliament Act? Does it mean repassing of the bill by a specified majority in the existing

House of Commons? Does it mean a fresh election on the issue to give the House a mandate to override the Senate?

The White Paper's proposals would magnify the importance of provincial governments. With the present strong centrifugal trend, and the multiplying problems which seem to demand wider central powers for their solution, is this desirable? Isn't there a case for a modern adaptation of Dunning's famous resolution: That the powers of the provinces have increased, are increasing, and ought to be diminished? Perhaps not; but is there a case for the opposite?

There is, of course, the possibility that giving the provincial governments this share in the making of central legislation and appointments will induce them to look more kindly on the maintenance of certain existing, and essential, central powers, and even on proposals to add to those powers *if* a case can be proved for doing so on *functional grounds*. But the provincial governments, or some of them, especially the stronger ones, may feel there isn't enough sugar on the pill. They may agree to take the sugar, then refuse even to look at the pill.

The present Senate is weak. It does some good, and very little harm. The reconstituted Senate would be much stronger: stronger for harm, rather than good. Why change?

The National Capital Problem

J. Harvey Perry

Considerable documentation is available on the national capital problem. An extensive study prepared by D. C. Rowat¹ gives most of the essential background for Ottawa proper, and the brief of the Western Quebec Regional Economic Council provides information on Hull. Other material is available in the Jones Report² and in the proposals of the Ontario Minister of Municipal Affairs to a meeting of municipal representatives in Ottawa in February 1967.³ This brief paper attempts only to set out in the most precise terms the issues to be faced in developing the national capital.

Some Basic Data

In 1966, in the metropolitan areas of Ottawa and Hull combined, there lived approximately 495,000 persons.⁴ In 1970 the total would be closer to 530,000. Population in the area is increasing very rapidly.

For the purposes of this discussion, the most important characteristics of the population may be outlined as follows:

- 1) In both Ottawa and Hull there is increasing dispersion of the resident population outside the central city. In 1966, of 384,000 people in the Ottawa metropolitan area, 24 per cent

¹ D. C. Rowat, "The Proposal for a Federal Capital Territory for Canada's Capital" in Ontario Advisory Committee on Confederation, *Background Papers and Reports*, Vol. I, Queen's Printer, Toronto, 1967, pp. 215-282.

² "Ottawa, Eastview and Carleton County Local Government Review", June 1965, Murray V. Jones, Special Commissioner.

³ Address by the Hon. J. W. Spooner, Minister of Municipal Affairs at a Meeting of Municipal Representatives, Château Laurier Hotel, Ottawa, February 1, 1967.

⁴ Revised 1968 census figures #95-615.

lived outside Ottawa proper. In the Hull metropolitan area about one-third live outside the city of Hull. In both cases, the proportion of non-city residents is growing. In short, despite the great extension of the boundaries of the municipality of Ottawa since World War II, the area is suffering from the familiar effects of urban sprawl.

- 2) There is a marked division between two languages and cultures. Of the 430,000 persons in the area in 1961,⁵ 162,000 claimed French as their mother tongue, 189,000 claimed it as their "official language", and 253,000 were Roman Catholics. These figures represent roughly one-third of the population of the Ottawa metropolitan area and four-fifths or more of the Hull metropolitan area. These aggregates establish only the main point of duality of culture, language, and religion. Local concentrations give much heavier weightings for specific areas.
- 3) The division between two provincial jurisdictions — Ontario and Quebec — results in two different sets of laws, tax systems and so on.
- 4) The two main population areas are physically separated by the Ottawa River, resulting in a traditional separation of development on each side of the river. Ottawa has emerged as a primarily government-oriented commercial city; Hull, as an area dependent on a few large industries which have added to neither the beauty nor the affluence of the region. To greatly oversimplify, Ottawa has become predominantly an Anglo-Saxon government-commercial centre; Hull, a predominantly French-speaking company town. The consequences for the physical appearance of the two areas are self-evident.

The other important characteristic of the area that concerns us is Ottawa's status as the capital city of Canada for more than a century.

The Problem

Setting aside the position of Hull for the moment, it is fairly obvious that if it were not for the fact that Ottawa is the national capital, the city's problems of urban expansion would not in themselves warrant attention at the federal-provincial level. But because Ottawa is the capital, a solution to its problems of metropolitan growth and bilingual environ-

⁵ No later figures are available at the time of writing.

ment is urgently needed. Moreover, Ottawa's status as the national capital may affect the application of any general solution to these problems.

It has been generally assumed, with justification, that present arrangements are unsatisfactory. The situation has all the ingredients of an extremely complex problem in government, and no serious attempt has been made to resolve it.

Attitudes on this question are often highly subjective. It is doubtful that a resident of Vancouver or of St. John's, Newfoundland would give top priority to the needs of the national capital among all the other needs faced by Canadian governments. Indeed, if in order to meet these needs substantial additional expenditures were required, he probably would be directly opposed. But many consider Ottawa's requirements of major importance. Many members of the federal Parliament, government officials, writers, and others with professional associations with and interests in Ottawa, as well as residents and visitors to the city, support a special program for the planned development of the capital. In particular, it is felt that, through its institutions, the national capital should recognize our bilingual and bicultural origins; and through its beauty, it should reflect a young nation of growing affluence. Given these objectives, the administration of the city cannot be allowed to interfere with the efficient operation of the largest organization in the country, the federal government.

Issues of Government

Federal Government. As the principal employer, property owner, and investor in the Ottawa region, the federal government has an obvious interest in its management. Over the next eight or ten years, it is estimated, federal government capital expenditure for buildings and acquisition of property in and around Ottawa will be \$700 to \$800 million, and could reach one billion dollars. This volume of expenditure alone will give the federal government a lively interest in the Ottawa region. In addition, it has undertaken to recognize bilingualism within its own area of competence (mainly employment of federal civil servants) and it appears to be concerned that other authorities follow suit.

Government of Ontario. Ontario is directly involved in the planning and development of Ottawa as the government responsible for municipal institutions, for education, for the courts, and for the general scheme of local organization in the area. No change in the existing arrangements can be made without action by the Ontario government.

Municipal Government. The City of Ottawa is directly and impor-

tantly involved in Ottawa's administration as the main municipal body in the area. Its powers and responsibilities have been bestowed by the Province, to which it is legally accountable. At the same time Ottawa is in the unique position as a municipality of having its plans and activities constantly influenced by the federal government, simply because that government occupies such a dominant position in Ottawa's affairs. Over the years a series of arrangements have been tried to ensure a certain degree of cooperation between federal and municipal authorities, but at best relations have been characterized by mutual suspicion and armed neutrality.

To a large extent the situation has been further complicated by the emergence of the usual metropolitan area problems on the Ontario side of the river. In the national capital region, there is a total of twenty-one municipalities, each affected in some way by the activities of the federal government. These municipalities are in various stages of chaos regarding area development, Ottawa apparently being the only one having an officially approved master plan. There is a master plan for the whole Ottawa region, but no body has been set up to implement it. In fact, even on the Ontario side of the Ottawa River, municipal government cannot be said to exist as a single entity, for all activities are fragmented among twenty-one units. While the Jones Report and the proposals made in February 1967 by the Minister of Municipal Affairs contemplate the establishment of a new metropolitan level of government, to date no such innovation has been made.⁶

Many acute problems face municipalities in the Ottawa area as a result of the very rapid population growth in the region. We will not discuss these here, however, since they are set forth adequately in D. C. Rowat's study.⁷

Possible Solutions

Proposals for a new arrangement have ranged all the way from complete federal dominance in the area to minor tinkering with existing institutions. Obviously any judgement about the objectives of a revision will significantly affect the type of solution ultimately proposed. My own list of objectives, advanced for consideration and discussion, would include the following:

- 1) For the federal government, an arrangement that would best facilitate the development of its own physical plant in Ottawa,

⁶ The regional municipality of Ottawa-Carleton was in fact established on January 1, 1969.

⁷ D. C. Rowat, *op. cit.*

its objectives for the enhancement of the physical beauties of the national capital, and its objectives for a federal service symbolic of our bicultural heritage.

- 2) For the provincial government, an arrangement that would recognize its responsibility for municipal and educational institutions in Ontario, wherever situated, and that would permit it to advance its plans for metropolitan development and education in Ottawa in step with its general plans throughout the province.
- 3) For the municipal government, creation of a vehicle that would enable all municipalities to act through a single entity on matters of common interest, while at the same time leaving with the existing local authorities responsibility for the conduct through politically elected representatives of matters of local interest.

The main implications of this particular set of objectives are as follows:

- 1) They rule out a federal district, such as that in Washington, D.C.
- 2) They require the creation of some new form of area government on which federal, provincial, and municipal interests would be represented.
- 3) They require the development of a new level of municipal government for the metropolitan Ottawa area, so that common municipal interests may be represented in the new area government.
- 4) They involve the retention of a locally elected level of municipal government.

While such a bald statement of the foregoing objectives leaves unanswered many vexing questions, in my view the problem must be approached in this way. Only by setting out a conceptual framework will any progress be made towards a detailed solution.

Hull

The position of Hull adds a very considerable complication to plans for development of the area. In a sense the city is already included in these plans, since it is part of the capital district in which the National Capital Commission operates. Putting the problem crudely, it seems futile to attempt to develop Ottawa as a more fitting national capital without also

improving conditions in Hull directly across the river. A complete rebuilding of large parts of the city would be required, a rebuilding for which undoubtedly neither the city nor the provincial government has funds. However, it seems that there is considerable local feeling in Hull against any further absorption by the federal government, except for the construction of additional federal buildings in Hull.

This is a difficult problem, and one which requires thorough investigation. I would suggest that it should be considered as a separate issue by both the federal government and the Province of Quebec.

